Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In the

Supreme Court of the United States

October Term, 1996

DOUGLAS A. CLARK and CHERYL CLARK,
Petitioners,

v.

CITY OF HERMOSA BEACH and CITY COUNSEL OF THE CITY OF HERMOSA BEACH,
Respondents.

Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The California Court of Appeal determined that applicants for land use permits had been denied a fair hearing under state law but were not entitled to Due Process under the Fourteenth Amendment. Without regard for applicants' property interest in the land they owned, the court found the land use permits were a government benefit in which applicants had no "legitimate claim of entitlement" and that arbitrary denial of those permits did not "shock the conscience":

1. Is a property owner entitled to due process when a city imposes limitations on the development and use of that owner's real property?

2. Does the process due an owner of property when a city imposes restrictions on the use of that property include a hearing before an impartial decision maker and notice and opportunity to be heard on the factors that form the basis of the restriction?

3. Should the "shocks the conscience" due process standard announced by this Court for reviewing alleged deprivations of liberty in the context of law enforcement replace the factors established in *Mathews v. Eldridge* for determining compliance with due process when government imposes restrictions on an owner's right to make reasonable use of real property?

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OPINION BELOW

The decision of the Court of Appeal of the State of California, Second Appellate District, is reported at 48 Cal. App. 4th 1152 (1996), and is reproduced as Appendix A (App.). The order modifying the opinion is reproduced as Appendix B. Page references are to the version in the Appendix.

JURISDICTION

The opinion of the California Court of Appeal, review of which is sought in this petition, was filed and entered on August 21, 1996. App. A-1. A petition for review was timely filed with the California Supreme Court, which denied review on November 13, 1996. App. D-1. The petition for writ of certiorari has been timely filed in accordance with Rule 13.1 of the Rules of this Court. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Title 42, United States Code, § 1983, provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action

at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Nobody questions the fact that petitioners Douglas A. and Cheryl Clark did not receive a fair hearing before the Hermosa Beach City Council (City Council). The issue in this case is whether they were entitled to any hearing at all when the city limited the use and development of their property. The Clarks sought to replace previously issued but expired permits with new ones necessary to demolish their duplex and construct a two-unit condominium in its place. When the matter came before the Hermosa Beach City Council in 1992, their neighbor and long-time opponent of their project was a member of the council and cast the deciding vote against their permit because their project would interrupt his view of the Pacific Ocean. The grounds for the denial were matters that were not even raised during the public portion of the hearing, when the Clarks would have had the opportunity to rebut them, and included enforcement of an ordinance that had not even passed the City Council.

The Clarks challenged this deprivation of use of their land by filing a lawsuit in state court which included a due process challenge pursuant to 42 U.S.C. § 1983. The trial court found that the denial of the permits was an arbitrary and discriminatory action. App. C-15-17. The court below held that the Hermosa Beach City Council used unfair hearing procedures in denying the permits. App. A-22-24. But the court below reversed the trial court's determination that the Due Process Clause was violated on two grounds. First, it held that the deprivation of the right to make reasonable use of property ***is not a deprivation of property*** unless the government's discretion "was so narrowly circumscribed that approval of the ... application was virtually assured." App. A-35-36. Second, it held that process and "conduct" employed in a land use permit denial must "shock the conscience" to be a violation of the Due Process Clause. App. A-42-43.

A. The Clarks Were Issued Permits in 1989 to Build a Condominium on Their Land

The Clarks, residents of Phoenix, Arizona, own a duplex in Hermosa Beach, California, one block from the Pacific Ocean. In 1989, the Clarks submitted permit applications[1] to the planning commission of respondent City of Hermosa Beach (City). The Clarks wanted to remove the duplex from their property and replace it with a two-unit condominium. This structure was designed to be the maximum height and lot coverage allowed by local ordinances--35 feet tall and 65% lot coverage. App. A-3. The planning commission approved the Clarks' project, finding:

> [t]he site is ... physically suitable for [the] type and density of the approved development," and "[t]he project will conform to all zoning and condominium criteria and will [be] compatible with adjacent properties."

App. A-3 (brackets in original).

B. Their Neighbor Organizes Opposition to the Clarks' Condominium to Protect His View of the Ocean

The person residing in an apartment one block inland from the Clarks, Robert Benz, actively campaigned against approval of the Clarks' project. Benz argued that the condominium would block his view of the Pacific Ocean. App. A-3. His letter appealing the permits to the City Council noted that the project "'will further constrict the view of the ocean from homes that are located behind and to either side ....'" App. A-3. The planning director informed the City Council that the "'condo is in compliance with all zoning ordinance requirements; the City has no view ordinance, and the Planning Commission did not believe view blockage was so significant that conditions related to view should be imposed.'" App. A-4. The appeal was not successful, and the Clarks received their permits.

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[1] Construction of the condominium required the City to approve three applications: a conditional use permit, a precise development plan, and a tentative parcel map. App. A-4.

C. After the 1989 Permits Expire, the Clarks Submit "Very Similar" Applications in 1992

Before the Clarks could begin building their condominium, the City adopted a new setback requirement. While the Clarks were revising building plans to accommodate the setback requirement, their permits expired. App. A-4. The Clarks submitted new applications to the planning commission in January, 1992, to comply with the new requirement. App. A-4. The planning director called their modification "very similar" to the structure approved in 1989--the height was the same and the lot coverage was reduced from 65% to 63.7%. App. A-4.

One planning commissioner commented that the Clarks' proposal "does conform to all the requirements" and stated it "doesn't seem equitable" to stall on its approval, and another commented that the Clarks "'responded to the guidelines that we developed over time, in fact, this is the best response I've seen in the time I've been here of somebody really trying to do what we've asked them to do.'" App. A-5.

The planning commission then unanimously approved the Clarks' applications. The commission found the site "'suitable for the type and density of the proposed development,'" the design "compatible" with the general plan and the "'immediate environment,'" and the project to "'conform to all zoning and condominium criteria and will be compatible with neighboring residential properties.'" App. A-6.

D. The City Council Denies the Permits

The planning commission decision on the Clarks' permits was again appealed to the City Council. Two weeks after the filing of the appeal, the City Council debated a proposed moratorium on new buildings taller than 30 feet, but the proposal failed to receive the four-fifths vote required by state law.[2] App. A-6. Thus, the maximum height limit, as well as the maximum lot coverage, did not change since the Clarks' 1989 applications were approved. App. A-4-5 n.2.

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[2] California Government Code § 65858. *See* App. A-6.

1. A Biased, Self-Interested Councilman Participates in the Decision--the Neighbor Who Earlier Opposed the Condominium

Robert Benz, still an active opponent of the project, was now a member of the City Council. At the beginning of the March 24, 1992, City Council hearing, the Clarks suggested that Robert Benz should recuse himself from the deliberation. The City Attorney opined that Benz had no conflict of interest since he was a renter, not an owner, and Benz did not recuse himself. App. A-8. The court below was later to find that Benz ***did have*** a conflict of interest because

> he stood to benefit personally by voting against the Clarks' project. ... [A]n interest in preserving his ocean view was of such importance to him that it could have influenced his judgment.

App A-22.

The court below concluded that "Benz's personal animosity toward the Clarks contributed to his conflict of interest; he was not a disinterested, unbiased decision maker."[3] App. A-23. Yet, he participated in the public hearing and the deliberations of the City Council, and cast the deciding vote to deny a rehearing and to deny the Clarks' permits. App. A-11. One of the reasons provided by the City Council for denying the permits was, "the requested development at the height and lot coverage ratio proposed is likely to interfere with the use or enjoyment of property in such area." App. A-12.

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[3] Benz's personal animosity manifested itself, among other ways, in such behavior as his urinating on the Clarks' house and in their planter, and then telling a newspaper reporter that Mrs. Clark wanted to see him urinate. App. A-14 n.12.

2. The City Council Deprives the Clarks of Notice and the Opportunity to Be Heard on Dispositive Issues by Not Raising the Issues During the Public Hearing

For over seven years, the planning commission had consistently ***not*** included "courtyards or landings above subterranean garages" in the calculation of lot coverage. App. A-9. After the close of the public portion of the hearing, a council member disputed this practice and argued that the Clarks' deck should be counted toward the lot coverage, which would then exceed the maximum allowed. That council member also asserted that the area of the Clarks' proposed courtyard should be subtracted from the open space total, dropping it below the minimum required. The planning director explained, in vain, that the courtyard had not been counted as open space in the first place. App. A-9 n.6.

The Clarks' request for a rehearing before the City Council, to enable them to address the lot coverage and open space issues, was denied by a 3-2 vote. App. A-10-11. The court below concluded that "the Clarks did not receive proper notice or an opportunity to be heard on those two issues, both of which were resolved against them and were cited as grounds for denying the permits." App. A-23; *see also* App. A-12 (resolution excerpts).

Although the moratorium on buildings taller than 30 feet failed to pass, the Clarks' project and two others that proposed building to the 35 foot limit were subsequently rejected. App. A-24. The resolution denying the permits stated: "'[t]he development, including, but not limited to, height ... is not in character with the development standards of the surrounding area.'" App. A-12. This was an historic finding. For the ten years preceding the Clarks' application, the City had approved *every* request to build to the maximum height in that area. App. C-16.

The court below characterized the City Council's actions as "implementing an unlawful 'backdoor' moratorium," and as evidence that "establishes that the Council was not impartial to the Clarks' project." App. A-24 n.21, A-24.

E. After a Bench Trial, the Superior Court Finds Due Process Violations

After the City Council denied the permits, the Clarks filed a lawsuit in state court against the City and the City Council. The lawsuit contained two separate legal actions: a petition for a writ of administrative mandate under California law and a complaint under 42 U.S.C. § 1983 alleging violations of the Fourteenth Amendment's Due Process Clause. App. A-12. The trial court granted the administrative mandate petition ruling that the Clarks had not been given a fair hearing and ordered the City Council to issue the permits.

The trial court also concluded that the City and the City Council had violated the Clarks' rights guaranteed by the Due Process Clause. App. C. The trial court ruled that the lack of notice and opportunity to be heard on the lot coverage and open space issues (App. C-10-11), the biases of individual council members (App. C-11-14), and the application of the failed moratorium and the new interpretation of the lot coverage ordinance to the Clarks' proposal (App. C-14-15) violated the Clarks' procedural due process rights.

The court further ruled that the Clarks were treated arbitrarily and discriminatorily, in violation of their substantive due process rights, as: they were singled out for a departure from the City's decade-long practice of approving all development applications to the maximum height limit (App. C-16); they were subjected to the failed moratorium (App. C-17); council members were biased against the Clarks and their project (App. C-7-8); and they were granted permits for a "virtually identical project on the same location" in 1989 (App. C-17).

F. The Court Below Holds That the City Deprived the Clarks of a Fair Hearing

The City and the City Council appealed both the decision on the petition for writ of mandate and the judgment on the civil rights claims. The California Court of Appeal for the Second Appellate District affirmed the issuance of the writ of mandate,

finding "the City Council deprived the Clarks of a fair hearing."[4] The City did not appeal from this ruling.

Although it concluded that the participation of Benz, the denial of notice and the opportunity to be heard on the issues of lot coverage and open space, and the application of the failed moratorium to the Clarks' project deprived the Clarks of a fair hearing, the court below held that the Due Process Clause had not been violated.

Relying on *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972), the court below decided that the Due Process Clause does require that landowners receive a fair hearing, or any hearing at all when they apply for permission to use their land. The court ruled that no fundamental property interest is at stake when a property owner applies for a land use permit. Instead of recognizing that an important element of the fundamental rights in ownership of property is deprived when a permit is denied, the court below ruled that the owner must have a property interest ***in the permit being sought*** in order to trigger the protections of the Due Process Clause. The court below framed the question "whether they [the Clarks] had a federally protected property interest in the development *of their project*," App. A-32 (emphasis added). The court defined the requisite interest "as precisely as possible": "not that of a landowner to construct a roof over his head; rather, it is the Clarks' interest in building a structure having *the specific dimensions they find desirable*." App. A-36 (emphasis added).

In addition, the court below found that neither the *conduct* of the City Council nor the nature of its decision-making process violated due process because the City Council's actions did not "shock the conscience." App. at A-42-43. While the court couched the discussion of the council's conduct and

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[4] The court below modified the writ by ordering only that the City Council conduct a new hearing under the development standards in place at the time of the 1992 applications and without the participation by the biased member of the City Council. App. A-25 n.23; A-30 n.26.

decisionmaking in terms of "substantive due process," at least part of this analysis is targeted at the *process* used by the City Council.[5]

SUMMARY OF ARGUMENT

There is a serious conflict between the court below and among the Federal Circuit Courts of Appeals as to whether the protections afforded by the Due Process Clause attach to landowners seeking permits to make reasonable use of their property. This conflict stems in large part from a misunderstanding by the lower courts of the nature of this Court's holding in *Board of Regents v. Roth*. In addition, there is a serious conflict between the court below and among the federal circuits as to whether the "shocks the conscience" standard is an appropriate standard for reviewing the conduct of a governmental body that denies the right to make reasonable use of private property.

REASONS FOR GRANTING THE WRIT

This Court has recognized the fundamental nature of the right to make reasonable use of land: "[T]he right to build on one's own property--even though its exercise can be subjected to legitimate permitting requirements--cannot remotely be described as a 'governmental benefit.'" *Nollan v. California Coastal Commission*, 483 U.S. 825, 833 n.2 (1987). When a city imposes restrictions on the right to develop or use real property, usually in the context of a permit application process, the city is affecting a fundamental right.

Courts should not be confused by the fact that in order to exercise the right to use one's property, the owner must apply for

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[5] This petition does not address any "substantive" due process claim, but only the court's application of the "shocks the conscience" standard to the *procedures* employed by the City Council in denying the Clarks' land use applications.

"permission," usually in the form of a permit or variance, from the appropriate local agencies. The process of granting or denying a permit is *not* a process that is designed to give the owner "permission" to take a government "benefit." It *is* a process whereby the government determines the level of restrictions that will be imposed on the preexisting right to make reasonable use of real property. The issue before this Court is whether a property owner who seeks to exercise his rights of property ownership through an application process is entitled to due process.

This is an issue that has confounded the courts of the land, including the court below. As discussed *infra*, the Third and Seventh Circuit Courts of Appeals have correctly held that, when government imposes restrictions on the use of real property, government proceedings to impose those restrictions must be conducted in accordance with the Due Process Clause.

On the other hand, the Second, Fourth, Sixth, Ninth, and Eleventh Circuit Courts of Appeals, and the California court below, hold that a landowner is entitled to due process only *after* the owner has obtained an "entitlement" or "vested right" to the permit at issue. In some of these jurisdictions, such as the court below, the courts treat the land use permitting process as a mechanism to create a government entitlement or benefit.

In *Board of Regents v. Roth,* 408 U.S. 564, this Court found that due process should attach *not only* to restrictions imposed on the holders of traditional property interests such as land ownership, *but also* to the denial of government benefits to persons with certain entitlements, such as continued employment.

The court below, as well as several other courts in the Nation, have compounded their mistake of treating the land use permits as a benefit by holding that until a landowner has an "entitlement" or "vested right" to the permits at issue, no rights of due process can attach. These courts confuse land use permits with government benefits and find that *Roth* is dispositive because, in that case, this Court confined due process review of denials of governmental benefits to just those benefits for which an entitlement exists. These courts ignore the fact that *Roth extended* the application of due process standards to certain governmental

entitlements, but did not *reduce* the applicability of due process standards to restrictions imposed on the existing right to make reasonable use of real property.

Other courts, however, have clearly rejected the notion that due process can be delayed until the owner receives a vested right to develop. Indeed, by reviewing on numerous occasions alleged deprivations of due process in the context of land use regulation, this Court has implicitly accepted the understanding that due process attaches at all stages of the land use permitting process, not just to the period of time after the landowner has obtained a vested right to the permits at issue.

This conflict among the lower courts and conflict with the practices of this Court sows confusion and disparate treatment of landowners. This is a question upon which this Court must grant review in order to resolve the conflict and in order to ensure fair procedures for property owners in proceedings to limit their use or development of their property. *See* Supreme Court Rules 10(b) and 10(c).

ARGUMENT

I

THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI TO RESOLVE A SERIOUS CONFLICT AMONG THE CIRCUITS AND THE STATE OF CALIFORNIA

The stark conflict among the lower courts over the property interest protected by the Due Process Clause of the Fourteenth Amendment in land use cases is both pervasive and long-standing. On one side of the conflict are the Third and Seventh Circuits that find, or implicitly assume, a protected property interest in land ownership. The Seventh Circuit decision in *River Park, Inc. v. City of Highland Park*, 23 F.3d 164 (7th Cir. 1994), highlights the conflict.

River Park, Inc., owned land in the City of Highland Park that was zoned for one house per three acres. *River Park*, 23 F.3d at 165. River Park decided to build a subdivision on its property requiring an increase in housing density. *Id.* River Park requested a rezone. *Id.* However, the city engaged in delaying tactics and failed to make a decision on the rezoning application. *Id.* The application expired and River Park was directed to refile. *Id.* By this time, however, River Park was bankrupt. *Id.* River Park then filed a Section 1983 claim alleging the city violated its procedural due process rights. *Id.* The District Court dismissed the complaint, ruling that River Park lacked a "legitimate claim of entitlement" to the new zoning it sought. *Id.* Although the Seventh Circuit ruled against River Park on the merits of its claim, the court went to great lengths to identify a protected property interest in River Park's ownership of its land:

> For the reasons the district court gave, River Park may well have lacked a property interest in one classification rather than another. But it surely had a property interest in the land, which it owned in fee simple, and it is therefore entitled to contend that the City's regulation of that land deprived it of property without due process. The references to property in the Constitution reflect its Lockean heritage. The founding generation viewed "property" in concrete terms--land and chattels acquired by the investment of effort or purchase from another. An owner may build on its land; that is an ordinary element of a property interest. Zoning classifications are not the measure of the property interest but are legal ***restrictions*** on the use of property. *See Euclid v. Ambler Realty Co.*, 272 U.S. 365 ... (1926). Licenses, permits, and classifications are important to owners because they reflect governmental promises not to interfere with private uses of property, but let us not confuse a decision not to intervene with the property itself.

Id. at 165-66 (emphasis in original).

The Third Circuit is in accord. In *DeBlasio v. Zoning Board of Adjustment for the Township of West Amwell*, 53 F.3d 592 (3d Cir. 1995), the Third Circuit had to consider the due process claims of a landowner who sought a variance for a nonconforming use. In that case, the court implicitly assumed the plaintiff had a protected property interest for procedural due process and explicitly found "one would be hard-pressed to find a property interest more worthy of substantive due process protection than [land] ownership." *Id.* at 601.

Contrary to the thoughtful reasoning of the court in *River Park*, however, the California court in this case applied the "entitlement" test of *Board of Regents v. Roth*, 408 U.S. 564, without regard for the Clarks' property interest in their land. The court proceeded on the assumption that the conditional use permit the Clarks sought was just another government benefit in which they must establish a "legitimate claim of entitlement." App. A-35-39. However, this does not accord with this Court's finding in *Nollan v. California Coastal Commission*:

> But the right to build on one's own property--even though its exercise can be subjected to legitimate permitting requirements--cannot remotely be described as a "government benefit."

Nollan, 483 U.S. at 833 n.2.

Nevertheless, several circuits stand with California on the other side of the conflict. These include the Second, Fourth, Sixth, Ninth, and Eleventh Circuits. These courts misapply this Court's holding in *Roth* and find a protected property interest only when the landowner can establish a "legitimate claim of entitlement" to a so-called benefit, such as in a permit or a particular land use.

RRI Realty Corp. v. Incorporated Village of Southampton, 870 F.2d 911(2d Cir. 1989), for example, involved a substantive due process challenge to a denial of a building permit. In that case, the Second Circuit traced the development of property interests for both procedural and substantive due process purposes and concluded the Supreme Court has always assumed a protected property interest in land ownership but that the circuit was

compelled by its own precedent to apply the *Roth* "entitlement" test. *Id.* at 917-18.

In *Sylvia Development Corp. v. Calvert County, Maryland*, 48 F.3d 810 (4th Cir. 1995), a property owner claimed a procedural due process violation for unfair denial of a rezoning application. The Fourth Circuit did not look to the property owner's interest in the land but relied on *Roth* and concluded the property interest must be found in the permit sought by establishing a claim of entitlement. *Id.* at 825-26. In *Triomphe Investors v. City of Northwood*, 49 F.3d 198 (6th Cir. 1995), the plaintiff challenged on substantive due process grounds the denial of a special use permit to build condominiums on its lots. Triomphe argued that the only property interest requirement is ownership of the property. However, as in the case at bar, the Sixth Circuit held Triomphe must establish a claim of entitlement to the actual permit. *Id.* at 202-03.

Likewise, in *Bateson v. Geisse*, 857 F.2d 1300, 1305 (9th Cir. 1988), a property owner brought a Section 1983 suit against the city for refusing to issue him a building permit or approve a minor plat. The Ninth Circuit stated:

> To state a procedural due process claim, Bateson must establish that he had a predictable property interest in his proposed minor plat. ... A property interest in a benefit protected by the due process clause results from a "legitimate claim of entitlement ... Board of Regents v. Roth.'" The court held "The district court concluded that Bateson failed to show that state or local law created an entitlement to approval of the proposed minor plat. ... Therefore ... we affirm the district court's conclusion that Bateson did not have a legitimate claim of entitlement to approval of his minor plat application."

Id. at 1305.

And, in *Marine One, Inc. v. Manatee County*, 877 F.2d 892, (11th Cir. 1989), a landowner sued the county for substantive due process violations alleging the county's rescission of permits authorizing the construction of a marina deprived the landowner of a property interest without compensation. The Eleventh Circuit

held the landowner did not have a protectable property interest in the building permits and was not entitled to due process protections. *Id.* at 894-95.

The reason for this conflict among the circuits and California is elusive. Although this Court as a matter of practice has applied due process review to restrictions imposed on the use of property, this Court has never *expressly* defined the protected property interest in a land use case. *See, e.g., Dobbins v. City of Los Angeles*, 195 U.S. 223 (1904); *Welch v. Swasey*, 214 U.S. 91 (1909); *Eubank v. City of Richmond*, 226 U.S. 137 (1912); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365; *Gorieb v. Fox*, 274 U.S. 603 (1927); *Zahn v. Board of Public Works of the City of Los Angeles*, 274 U.S. 325 (1927); *Nectow v. City of Cambridge*, 277 U.S. 183 (1928)); *State of Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928); and *City of Eastlake v. Forest City Enterprises*, 426 U.S. 668 (1976).

The conflict between the Third and Seventh Circuits on the one hand and the Second, Fourth, Sixth, Ninth and Eleventh Circuits and the California court on the other is the very type of conflict that demands resolution by this Court. It causes confusion and results in contradictory enforcement of the law. Many businesses and individuals own property in numerous jurisdictions and are subject to a myriad of complex, often onerous, land *restrictions* that hinder or stymie productive use of their land. These entities should not be subject to uncertain or inconsistent application of federal law. For these reasons, this Court should grant the writ of certiorari.

II

WHETHER LANDOWNERS SEEKING A PERMIT HAVE A PROTECTED PROPERTY INTEREST IN THEIR LAND FOR DUE PROCESS PURPOSES UNDER THE FOURTEENTH AMENDMENT IS AN IMPORTANT QUESTION OF LAW SUBJECT TO REPETITION NATIONWIDE

As with any other real property owner, the Clarks have a constitutional right to the reasonable use of their property.

> Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use and dispose of it. The Constitution protects these essential attributes of property .... property consists of the free use, enjoyment, and disposal of a person's acquisitions without control or diminution save by the law of the land.

Buchanan v. Warley, 245 U.S. 60, 74 (1917). The building permits the Clarks sought are a restriction on the use of their land. However, in reliance on this Court's "entitlement" test in *Roth*, the lower court characterized these permits as a government benefit in which the Clarks had no "legitimate claim of entitlement" and, therefore, no protected property interest. App. A-32-39. But, the "entitlement" test is inapplicable in a land use case such as this.[6] The relevant property interest was not in the permits sought by the Clarks but in the land the Clarks owned. Under the Fourteenth Amendment, therefore, the Clarks were entitled to a fair hearing. This Court's decision in *Roth* supports this conclusion and undercuts the lower court ruling.

In *Roth*, this Court determined an untenured assistant professor had no protected property interest in continuing employment and was, therefore, not entitled to a hearing for cause when the university declined to renew his contract of employment. There was no constitutional or statutory right to be employed by the government and the professor's terms of employment did not provide for contract renewal absent "sufficient cause." *Roth*, 408 U.S. at 578. There was no state statute or university rule or policy that secured the professor's interest in reemployment or that

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[6] The court below found that because the City Council had discretion in the granting of the permit, the Clarks were not entitled to the permit and thus due process did not attach. App. A-38-39. The court, however, failed to recognize that, as long as *some* standards applied to the decision-making process and as long as the City Council does not have *total* discretion in reaching its decision, *some* due process will apply. The court below recognized that under well-established California law, there are standards to apply to the permitting process. *See* App. A-30 n. 26 (need to apply preexisting height limitation).

created any legitimate claim to it. *Id.* At most, this Court reasoned, the professor had an abstract concern in being rehired, but he did not have a property interest sufficient to require the university to give him a hearing. *Id.*

In *Roth*, this Court established a standard for determining a protected property interest in a government benefit so as to define the outside limits of procedural due process. As this Court stated, "When protected interests are implicated, the right to some kind of prior hearing is paramount. But the range of interests protected by procedural due process is not infinite." *Roth*, 408 U.S.at 569-70. Thus, for certain benefits, this Court employed a test requiring the plaintiff to establish a "legitimate claim of entitlement." *Id.* at 577. This Court did not, however, redefine property interests protected by the Fourteenth Amendment that do not derive from a government benefit. As to such interests, this Court made only a passing, but significant, reference. "The Court has also made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money." *Id.* at 571-72. In this language, this Court recognizes an already established protected property interest in "actual ownership of real estate." It is this interest to which the Clarks lay claim.

The significance of *Roth*, and its recurring misapplication, is aptly explained in the Second Circuit case of *RRI Realty Corp. v. The Incorporated Village of Southampton*, 870 F.2d 911. As the Second Circuit explained, the initial effort to subject local land use decisions to constitutional scrutiny involved challenges to new zoning restrictions imposed upon property owners. *Id.* at 914. *See Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (zoning regulation upheld). However:

> [I]n the early zoning cases, there was no dispute as to whether the plaintiff had a property interest within the meaning of the Fourteenth Amendment; his property interest was in the land he owned, land that the local regulating body sought to restrict as to use.

RRI Realty, 870 F.2d at 915.

The Second Circuit explains further that the next phase of land regulation cases involved applications from property owners to obtain a change in existing zoning and that the analytical framework of constitutional challenges to land use regulation was affected by this Court's 1972 decisions in *Roth* and *Perry v. Sinderman*, 408 U.S. 593 (1972). *RRI Realty*, 870 F.2d at 915. According to the Second Circuit, both decisions were potentially pertinent to land use regulation in their pronouncement that a property interest, within the meaning of the Fourteenth Amendment, includes "not only what is owned but also, in some limited circumstances, what is sought." *Id.* at 915. Therefore, these cases expanded rather than diminished the concept of property under the Fourteenth Amendment. *Id.*

Nevertheless, after 1972, some courts considering constitutional challenges to land use regulation began citing *Roth* and asking whether the applicant had a "clear entitlement" to the approval sought from the land use regulating body. *Id.* at 915. In telling summation, the Second Circuit concludes:

> It is not readily apparent why land regulation cases that involve applications to local regulators have applied the *Roth* entitlement test to inquire whether an entitlement exits in what has been applied for--whether a zoning variance, a business license, or a building permit--instead of simply recognizing the owner's indisputable property interest in the land he owns.

Id. at 917.

Through a misapplication of *Roth*, some lower courts--including many Circuit Courts of Appeals and the California court in this case--have distorted due process law so as to deny land owners, like the Clarks, the constitutional protections to which they are entitled. There are important policy reasons why this Court should review this case and reverse this disturbing trend:

> The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or

> mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process.

Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980).

With this petition this Court has an opportunity to clarify a trend that has disturbed at least one member of this Court:

> [T]he Court has increasingly emphasized the creation and delineation of entitlements in recent years, it has not always placed sufficient stress upon the protection of individuals' traditional rights in real property.

United States v. James Daniel Good Real Property, 510 U.S. 43 (1993) (Thomas, J., concurring and dissenting).

The right to make reasonable use of real property is a fundamental attribute of this Nation's character. It is a core principle of our Constitution and one that has made this Nation unique--both in terms of our economic lives but also in our ability to maintain individual autonomy. As this Court has aptly noted, our liberty is inseparable from our rights in property. *Lynch v. Household Finance,* 405 U.S. 538, 552 (1972). And while it is perfectly appropriate that the right to use property be subject to reasonable government regulation and restrictions in furtherance of public health, safety, and general welfare, such restrictions must be imposed with some modicum of fairness and due process. But the court below holds that the right to a fair hearing and due process attach only *after* one obtains a vested right or entitlement to the permit being sought. Other courts are not nearly so parsimonious. Only this Court can reaffirm the constitutional protections the Fourteenth Amendment affords landowners nationwide and only this Court can clarify the meaning of this Court's *Roth* decision. To resolve this question, therefore, this Court, pursuant to Supreme Court Rules 10(b) and (c) should grant the petition for writ of certiorari.

III

THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI TO RESOLVE A CONFLICT OVER WHETHER THE "SHOCKS THE CONSCIENCE" DUE PROCESS STANDARD APPLIES WHEN GOVERNMENT RESTRICTS THE RIGHT TO MAKE REASONABLE USE OF PROPERTY

When due process standards are applied to the deprivation of the right to use real property, some lower courts, including the court below, apply a "shocks the conscience" standard, rather than the more traditional factors identified in *Matthews v. Eldridge*, 424 U.S. 319 (1976).[7] Other courts find this notion highly inappropriate.

The court below agreed that there was no violation of due process when the City Council (1) voted with a key member participating who "had a conflict of interest in voting on the project," (2) decided "issues raised for the first time after the public hearing was over," and based its decision on nonexistent standards. App. A-43. The court found that there was no due process violation because these procedures were not "oppressive" and did not "shock the conscience." *Id.* at A-42-43.[8]

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[7] These standards include the consideration of the private interest affected by the official action; the risk of an erroneous deprivation of that interest through the procedures used, as well as the probable value of additional safeguards; and the government's interest, including the administrative burden that additional procedural requirements would impose. *Id.* at 335.

[8] While the court couched this discussion in terms of *substantive* due process, it plainly was referring in large part to the actual *procedures* employed by the City Council. To whatever extent that substantive due process was at issue in the decision below, it is not part of this petition. The Clarks are arguing simply that the "shocks the conscience" standard should not apply to reviewing the *procedures* by which government denies a land use permit application.

This Court applied the "shocks the conscience" test to evaluate alleged infringements on liberty by law enforcement personnel enforcing criminal laws. *Rochin v. California*, 342 U.S. 165, 172-74 (1952). In *Rochin*, this Court grappled with the question of whether certain actions by the police to obtain evidence of a crime concealed by a criminal suspect would violate due process. The police tried forcibly to remove contraband from a suspect's mouth when he was swallowing it. Failing that, they took the suspect to the hospital to have his stomach pumped. *Rochin*, 342 U.S. at 166. But there should be no room for the application of a substantive due process standard taken out of the context of criminal law enforcement to the review of procedures employed by the City co uncil in denying the land use permit application in this case.

The *Rochin* Court recognized that "the administration of criminal justice is predominately committed to the care of the States," *id.* at 168, and that there exists "the comprehensive right of States to fashion their own rules of evidence for criminal trials," *id.* at 173. Given this context, and the obvious fact that law enforcement entails the use of force by government employees in a necessarily improvisational manner, the Court was careful to circumscribe any vehicle, such as due process challenges, that interfered with this basic and inherently dangerous responsibility of the states.

The *Rochin* Court's solution was to hold that action by police on the streets restricting liberty would violate due process if it could be said that it was "conduct that shocks the conscience," as opposed to actions that merely "offend some fastidious squeamishness or private sentimentalism about combating crime too energetically." *Rochin*, 342 U.S. at 172. The word "shocks" is employed because of the context: the messy business of crime fighting.

In stark contrast to the court below, the application of the "shocks the conscience" standard to review of the land use permitting process was plainly rejected by the Sixth Circuit. When employed in the context of an alleged deprivation of property, the very language of this test becomes almost laughable. In *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1222 (6th Cir.

1992), the court wryly noted that "after all we would not expect a planning commission or board of adjustments to be pumping the landowner's stomach."

At least four other Federal Circuit Courts of Appeals have declined to apply the "shocks the conscience" standard in land use decisionmaking. *See Sierra Lake Reserve v. City of Rocklin*, 938 F.2d 951, 57-58 (9th Cir. 1991), *cert. granted, judgment vacated, and remanded*, 113 S. Ct. 31 (1992), *reversed on other grounds*, 987 F.2d 662 (9th Cir. 1993); *DeBlasio*, 53 F.3d at 601-02; *Marks v. City of Chesapeake, Virginia*, 883 F.2d 308, 309 (4th Cir. 1989); *Brady v. Town of Colchester*, 863 F.2d 205, 215-16 (2d Cir. 1988).[9]

The California Court of Appeal, on the other hand, joins the First Circuit and New Jersey Supreme Court in importing this test into the property deprivation context. *See PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28 (1st Cir. 1991), *cert. dism.*, 503 U.S. 257 (1992); and *Rivkin v. Dover Township Rent Leveling Board*, 143 N.J. 352, 371 (1996).[10]

Thus, these courts and the court below have departed from this Court's traditional means of reviewing alleged denials of due process in the context of restrictions imposed upon the use of real property. The opinion below exacerbates this conflict on an important issue of constitutional law, involving the fundamental right of individuals to be free from arbitrary restrictions on the use of their private property. This Court should grant the petition for writ of certiorari to settle this conflict.

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[9] To the extent that these cases dealt with substantive due process, the point remains the same--the "shocks the conscience standard" should not apply when the right to put real property to reasonable use is denied--especially in the *procedural* context of the present case.

[10] While these other courts may be excused to some extent for applying the standard in the substantive due process context, that is no reason at all for applying it to procedural violations of the present case.

CONCLUSION

The federal and state courts must understand that reasonable use of one's property is a constitutional right and that a building permit is a restriction on that right subject to the procedural due process protections of the Constitution. It is not a privilege to be meted out by a parsimonious and whimsical government. For the reasons stated above this petition for writ of certiorari should be GRANTED.

DATED: February, 1997.

Respectfully submitted,

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Filed 8/21/96

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

DOUGLAS A. CLARK, et al., Plaintiffs and Respondents, v. CITY OF HERMOSA BEACH, et al., Defendants and Appellants.	B089504 (Super. Ct. No. YS002665)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jean E. Matusinka, Judge. Reversed with directions.

Richards, Watson & Gershon, Rochelle Browne, Roxanne M. Diaz, and Michael Jenkins, City Attorney, for Defendants and Appellants.

Rutan & Tucker, M. Katherine Jenson and Jeffrey M. Oderman for Plaintiffs and Respondents.

*Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts III and IV.

Douglas and Cheryl Clark own a duplex in the City of Hermosa Beach, California (the "City"). In 1992, they applied to the Hermosa Beach Planning Commission for permits to demolish the duplex and replace it with a two-unit condominium. The commission approved the project. The matter was appealed to the City Council (the "Council"). By a 3-2 vote, the Council denied the permits, finding the size of the proposed structure to be excessive.

The Clarks filed this action, seeking a writ of administrative mandate (Code Civ. Proc., § 1094.5) and alleging a violation of federal civil rights (42 U.S.C. § 1983). The trial court granted the writ petition, directing the City to rescind the Council decision and to reinstate the planning commission's approval of the project permits. The court also found for the Clarks on their civil rights claim, awarding them $213,300 in damages and $133,895.21 in attorney fees and litigation expenses.

On appeal, the City challenges the trial court's determination of liability, the award of damages, and the calculation of attorney fees and costs. In the published portion of this opinion, we conclude that the Clarks were deprived of a fair hearing before the City Council and were accordingly entitled to a writ of mandate. However, the trial court erred in directing that the planning commission's decision be reinstated. Instead, the court should have ordered the Council to rehear the matter and provide a fair hearing. We further conclude that the trial court erred in finding that the City violated the Clarks' civil rights. In the unpublished portion of the opinion, we conclude that the trial court should not have awarded damages or attorney fees and should have disallowed certain cost items.

BACKGROUND

In 1982, the Clarks bought a duplex in the City, located at 2902 Hermosa Avenue, a block from the ocean. They rent out one of the units and use the other unit as their second home, making frequent visits to California from their primary

residence in Phoenix, Arizona. The property is in an area designated as an R-3 zone, which is a multiple-family residential zone.

After purchasing the property, the Clarks hired an architect and developed plans to demolish the existing duplex and replace it with a two-unit condominium. In 1989, they applied to the planning commission for permits to build a structure 35 feet high, with lot coverage of 65 percent—the maximum height and lot coverage allowed under City law. (Hermosa Beach Mun. Code, §§ 601, 606.)[1] The commission approved the project, finding that "[t]he site is ... physically suitable for [the] type and density of the proposed development," and "[t]he project will conform to all zoning and condominium criteria and will [be] compatible with adjacent residential properties."

A local resident, Robert Benz, who lived a block inland from the Clarks, sought to overturn the commission's decision. He gathered signatures on five petitions, which stated that "the undersigned, being residents of the city of Hermosa Beach, hereby ... appeal the issuing of the building permit for the [proposed project] on the basis that the construction of the building will adversely affect the views of neighboring homes." In a letter to the Council dated February 11, 1989, Benz stated: "The action taken by the City Planning Commission ... is unacceptable to the wishes of the petitioners. The 35 foot height of the projected condominium proposal will further constrict the view of the ocean from homes that are located behind and to either side [of] the lot. [¶] ... [¶] There seems to be a wanton disregard for the rights of others in the City of Hermosa Beach when it comes to the building of homes and condominiums. For their own financial gain, developers and speculators have

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[1] Unless otherwise indicated, we refer to section 601 of the Hermosa Beach Municipal Code as it existed from October 1986 to September 1992. It stated: "No building shall exceed thirty-five (35) feet in height...."

continually proposed the building of high structures in order to maximize the incident view of the ocean for their own projects. The building of these structures limits the view of the neighboring homes solely to the sight of these excessively high structures.... It is time to stop the issuing of building permits that ignore the restriction of the view of others."

By letter of March 19, 1989, Benz requested that the City waive the fees for his appeal of the commission's decision. In a March 23, 1989 memo to the City Council, Planning Director Michael Schubach advised against granting Benz's request: "Attached is a request to waive the fees for an appeal of a proposed 2 unit condo at 2902 Hermosa Avenue. [¶] The condo is in compliance with all zoning ordinance requirements; the City has no view ordinance, and the Planning Commission did not believe view blockage was so significant that conditions related to view should be imposed. [¶] ... [¶] The staff can find no grounds to waive the appeal fees...." Based on Schubach's memo, the Council declined to waive the fees, and Benz apparently did not further pursue the appeal.

After the approval of the Clarks' 1989 project, the City adopted a new setback requirement, necessitating that the Clarks revise their plans. In the interim, the 1989 permits expired. In January 1992, the Clarks submitted another application for the requisite "permits" (i.e., a conditional use permit, precise development plan, and tentative parcel map) and paid $1,261 in processing fees. The proposed structure, a two-unit condominium, was—in the words of Planning Director Schubach—"very similar" to the one approved in 1989. For example, it had the same height (35 feet), though slightly smaller lot coverage (63.7 percent instead of 65 percent).[2]

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[2] These figures on height and lot coverage were determined by the planning commission staff. We also note that, at the time of the Clarks' 1992 application, the maximum height and lot

(continued...)

By report dated January 28, 1992, the planning commission staff recommended approval of the project, noting that the Clarks' architect "consulted with staff early in the design process to ensure compliance with applicable code requirements." According to the report, "[l]ot coverage is at 63.7%, all the required setbacks have been met, and the height on the sloped lot is held within the 35 foot limit." The report concluded that the project complied with all planning and zoning conditions.

At the public hearing before the planning commission on February 4, 1992, Planning Director Schubach presented the staff report on the Clarks' plans and urged approval of the permits. Two City residents spoke against the project, arguing that new buildings should not exceed 30 feet in height. The commissioners then discussed the possibility of asking the City Council to adopt a moratorium on construction in R-3 zones until a decision could be made about reducing the 35-foot height limit to 30 feet. On that subject, one commissioner remarked: "I have somewhat of a problem with the idea that this project, which does conform to all the requirements, has been singled out .... I would much more favor dealing with this on its merits and recommending an action. I can understand the 30 ft. height limit as a policy. I think we should recommend action on that, but separate from action on this. I think that we're holding the [project] hostage to the other and that doesn't seem equitable." Another commissioner stated: "I think what I see here is an applicant that responded to the guidelines that we developed over time, in fact, this is the best response I've seen in the time I've been here of somebody really trying to do what we've asked them to do. I have a problem with trying to chang[e] the rules in midstream, that really creates a problem

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[2] (...continued)
coverage allowed under City law had not changed since the approval of the Clarks' 1989 plans.

for me.... [W]e don't make zone changes based on an individual problem."

The commission ultimately voted, without dissent, to approve the Clarks' conditional use permit, tentative parcel map, and precise development plan. In doing so, the commission found that (1) the "[s]ite is zoned R-3 and is physically suitable for the type and density of the proposed development," (2) the "[d]esign of the proposed subdivision is compatible and consistent with the City's General Plan, and is compatible with the immediate environment," and (3) the "project will conform to all zoning and condominium criteria and will be compatible with neighboring residential properties." The commission also recommended that the City Council consider enacting a moratorium on construction in R-3 zones so that the planning staff could study the height issue.

On February 12, 1992, several residents appealed the commission's approval of the Clarks' project to the City Council. The appeal, accompanied by petitions bearing numerous signatures, objected to "the spread of condominiums, and the ability of these new developments to build higher than thirty feet."

On or about February 25, 1992, the Council debated whether to impose a moratorium on the construction of buildings taller than 30 feet in R-3 zones, pending further study of the height issue. To be approved, such an interim ordinance required a four-fifths vote of the Council. (Gov. Code, § 65858.) The measure garnered three out of the five possible votes and therefore failed. Absent a moratorium, the Council directed that the planning commission hold public hearings to determine whether the R-3 height limit should be reduced to 30 feet.

Meanwhile, in connection with the appeal of the commission's decision on the Clarks' project, the planning staff gathered additional information for the City Council. In a March 17, 1992 memo to the Council, the commission stated:

"The subject location is in an area that has not had a considerable amount of development in the last 7 years. From staff's research, the last 7 years is the approximate time frame that development projects started to be constructed to the maximum height allowed. [¶] Also, from a 'window survey' of this area, it is estimated that most development in this area is 30 feet, or under.[3]] [¶] In regard to view blockage, staff is unable to determine whether views from development would be any less blocked at 30 feet than at 35 feet.... [¶] If a significant impact is noted, a finding could be made, and as a condition of approval, a reduction in height could be required. [¶] However, it should be considered that if the adjacent property were to be recycled and built also to 35', any view lost may be restored."

A follow-up memo dated March 24, 1992, provided more specific information on the Clarks' project: "The residence directly adjacent to the north [of the Clarks' property] reaches the 35' height limit at the east half of the property. [¶] The height of the structure directly to the east is between 25' and 30' .... [T]he dwellings in the general area are 30 feet or less. However, there are some dwellings that reach as high as 40'.... [¶] The R-3 area in question, between Manhattan Ave. and Hermosa Ave., **drops down an average of 24' below the R-1 and R-2 zones** that are east of Manhattan Avenue. Therefore, in this case, allowing a 35' height limit in front of areas with 25' and 30' limits would not necessarily create view blockage. [¶] In the particular case of 2902 Hermosa Avenue, the building only reaches the 35 foot limit at the west end along Hermosa Avenue, and the east end of the building is only 28' above grade." (Boldface in original.)

On March 24, 1992, the City Council held a public hearing on the appeal in the Clark matter. Present at the hearing were

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[3] In the one block area east of the Clarks' property, approximately 75 percent of the houses are 30 feet in height or lower.

Councilmembers Robert Essertier, Sam Edgerton, Albert Wiemans, and Robert Benz.[4] (Councilmember Kathleen Midstokke was absent.) At the beginning of the hearing, Planning Director Schubach spoke against the appeal and in favor of sustaining the commission's decision. Immediately thereafter, a resident (and apparently a former councilmember), Jim Rosenberger, raised a "point of order," asking whether Councilmember Benz should recuse himself because he lived in close proximity to the proposed project and had opposed the Clarks' 1989 plans. In response, City Attorney Charles Vose stated that the location of Benz's apartment did not create a conflict of interest because Benz leased, rather than owned, his residence. Nor, according to Vose, did Benz's opposition to the Clarks' 1989 project establish bias. After Vose rendered this advice, the hearing proceeded. Benz did not recuse himself.

From the audience, 13 individuals (including Mr. Clark) spoke in favor of the project; five spoke against it. Those opposing the project thought that the proposed structure was too high and did not "fit" into the neighborhood. Mr. Clark stated that if the Council imposed a 30-foot height limitation on the structure, it would be "impossible" to build and would have to be "completely redesigned."

When the public portion of the hearing had concluded, Councilmember Essertier raised for the first time a concern with the lot coverage of the project. That issue is governed by section 229.1 of the Hermosa Beach Municipal Code, which

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[4] Benz was elected to the Council in 1990. He was the same person who, as a private citizen, had opposed the Clarks' 1989 permits by circulating petitions and attempting unsuccessfully to appeal the commission's approval of the project. As of March 1992, Benz still lived in the same location (2901 Manhattan Avenue), where he leased a three-bedroom apartment.

states: "'Lot coverage' shall include the footprint of the building plus cantilevers and decks higher than thirty (30) inches above grade ...." Essertier believed that the planning commission had not included the Clarks' "deck" in calculating lot coverage. Under his interpretation of the municipal code, the lot coverage for the structure, including the "deck," exceeded the allowed amount (65 percent). In response to Essertier's statement, Planning Director Schubach explained that for over seven years, the planning commission had not treated courtyards or landings above subterranean garages—like the Clarks'—as "decks" and had not included them in determining lot coverage.[5] Councilmember Essertier further expressed his view that the project did not have sufficient "usable open space."[6]

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[5] According to the City, while the planning commission had consistently interpreted the lot coverage provision not to apply to "decks" like the Clarks', the Council had never reviewed or approved the commission's interpretation. Apparently, the Council had not considered the issue until the present case.

[6] The municipal code requires a minimum of 300 square feet of usable open/private space per condominium unit. (Hermosa Beach Mun. Code, §§ 607(2), 7.26(e)(1).) That space "shall not be enclosed on more than two (2) sides." (*Id.*, § 607(2).) The planning commission determined that the Clarks' project had 300.5 square feet of open space per unit—just barely over the required minimum. However, Councilmember Essertier asserted that since the structure's courtyard was enclosed on three sides, the commission had erred by treating it as open space. Such an error would have reduced the open space per unit by 85 square feet, clearly below what City law required. Planning Director Schubach believed that the courtyard had not been counted toward the open space requirement.

Councilmember Wiemans summed up his position on the appeal as follows: "First, this is an R-3 neighborhood and we ought to consider it as R-3. We should not start to come up with a new method of prospective downsizing. What we need here is certainty of development, I mean, when people come here to build a home, they ought to know what they can expect. It shouldn't get every time down to the same point that these same five illustrious people here are going to come up with different standards, this is absolutely asinine."

At the end of the meeting, Councilmembers Essertier, Edgerton, and Benz voted to deny the permits without prejudice and to refer the matter back to the planning staff to develop findings consistent with the Council's views on the height, lot coverage, and open space issues.[7] Councilmember Wiemans voted against the appeal. The Council scheduled final action on the permits for April 14, 1992, and so informed the Clarks in writing.

By letter dated April 10, 1992, the Clarks' attorneys objected to the Council's having considered new issues—lot coverage and usable open space—after the close of the March 24 public hearing. The letter noted that the Council had not applied the lot coverage requirement in accordance with the seven-year interpretation adopted by the planning commission and that the Clarks had not been given an opportunity to address the Council on the issues of lot coverage or open space.

At the April 14, 1992 Council meeting, the Clarks' attorney requested that the appeal be reheard. In a similar vein, Councilmember Wiemans moved to reopen the appeal and hold another public hearing. As Wiemans explained: "[Clark] was

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[7] By denying the permits "without prejudice," the City allowed the Clarks to submit revised plans (in accordance with the Council's height, lot coverage, and open space demands) without having to pay additional processing fees.

basically within the mill and then at the very tail end we, as a council, proposed additional requirements. Now, I'm suggesting to you that this is not the way to give people the benefit of the law—this is not the way to dispense equal justice.... I believe we are on the wrong side of the argument and my suggestion to this council would be we are to reconsider our entire line of reasoning.... [¶] ... [¶] ... [T]his applicant is in the final stages of what he wanted to do. He complied with what was the law at the time and what we are doing is taking away from him what the law provided."

Councilmember Midstokke had this to say: "As you know, recently we did attempt to implement an urgency ordinance regarding not allowing height over 30 feet while we study the height issue to be implemented and it could not reach four votes with this council.... I see a terrible precedent being set by this council in that they couldn't get four votes for an urgency ordinance so by a three vote majority on a project by project basis, they're going to deny anything that's 35 feet in the R-3 until they change the height down to 30 feet. They have denied this project. At the Planning Commission meeting last Tuesday night, two more projects were denied that were 35 feet in the R-3 zone. If the urgency ordinance had been adopted, all three of these projects would have been grandfathered. They would not have been stopped. The result of this council action and the action by the Planning Commission last Tuesday is that you are implementing an R-3 height change from 35 to 30 feet immediately. There is no notice, there's no public hearings, there's no urgency ordinance .... I think the Clarks deserve a rehearing on the issue of lot coverage and usable open space which was not brought up before, if they do not also deserve one on the height issue."

The motion to rehear the appeal failed, with Councilmembers Essertier, Edgerton, and Benz voting against it. Those three Councilmembers then approved a resolution denying the Clarks' permits. The resolution stated in part that

(1) "the requested development at the height and lot coverage ratio proposed is likely to interfere with the property values in the vicinity or interfere with the use or enjoyment of property in such area," (2) "[t]he project exceeds the permissible lot coverage," (3) "the development, including, but not limited to, height and open space is not in character with the development standards of the surrounding area," and (4) "[t]he type of development proposed ... would negatively impact the neighborhood's integrity and the character of the community." The resolution stated that the permits were denied without prejudice to the Clarks' submitting revised plans correcting the alleged deficiencies in height, lot coverage, and open space. Councilmembers Wiemans and Midstokke voted against the resolution.

On July 13, 1992, the Clarks filed this action against the City, the City Council, and Councilmembers Essertier, Edgerton, and Benz. Two weeks later, the Clarks filed an amended pleading asserting two claims: (1) a petition for a writ of administrative mandate, alleging that the City had deprived the Clarks of a fair hearing and had abused its discretion (Code Civ. Proc., § 1094.5); and (2) a complaint alleging a violation of procedural due process (42 U.S.C. § 1983).[8] In September

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[8] Section 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

1992, the Clarks dismissed the individual defendants without prejudice.[9]

On August 29, 1994, the trial court heard argument on the writ petition. The next day, after reviewing the administrative record and the parties' arguments, the trial court granted the petition on the grounds that: (1) the Clarks did not receive a fair hearing; (2) the City abused its discretion, in that it had not proceeded according to law and its decision was not supported by legally adequate findings, nor were the findings supported by the evidence; (3) the Clarks were denied due process; (4) Councilmember Benz had a conflict of interest under the Political Reform Act (Gov. Code, § 81000 et seq.)[10] and under common law, such that "[h]e was legally precluded from participating in the decision on the Project [p]ermits"; (5) the City applied standards to the Clarks' project that were not in effect at the time their application was complete, thus violating the Subdivision Map Act (Gov. Code, § 66410 et seq.);[11] and

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[9] On September 8, 1992, the City adopted a new ordinance restricting the height of buildings in R-3 zones to 30 feet unless specified conditions are satisfied, i.e., an extension above 30 feet is necessary to take advantage of a scenic view over surrounding structures *and* a substantial number of existing buildings in the vicinity are higher than 30 feet. (Hermosa Beach Ord. No. 92-1074, § 1.)

[10] In part, the Political Reform Act prohibits public officials from making, participating in, or attempting to use their official position to influence a governmental decision in which they know or have reason to know they have a financial interest. (Gov. Code, § 87100.)

[11] With exceptions not applicable here, the pertinent section of the Subdivision Map Act provides that "in determining whether

(continued...)

(6) the City's actions against the Clarks were discriminatory. The trial court ordered the City to set aside the Council's resolution denying the Clarks' permits and to reinstate the planning commission's decision approving the project.

In early October 1994, the trial court, sitting without a jury, heard testimony on the Clarks' civil rights claim. Witnesses included the Clarks and Councilmembers Essertier, Edgerton, and Benz.[12] At the close of the evidence, the court took the matter under submission. By minute order dated October 20,

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[11] (...continued)
to approve or disapprove an application for a tentative map, the local agency shall apply only those ordinances, policies, and standards in effect at the date the local agency has determined that the application is complete ...." (Gov. Code, § 66474.2, subd. (a).)

[12] A portion of the trial focused on Benz's personal animosity toward the Clarks, which developed before his election to the Council. For example, according to Mr. Clark, it was fairly common for Benz to run by their windows and yell "loud, obnoxious noises in the morning." On one occasion at the beach, Benz and some of his friends were "horsing around" near the Clarks' children. Concerned for the children's safety, Mrs. Clark asked Benz to stop or go elsewhere. Benz refused and began mocking her. Further, Mrs. Clark testified that on a Friday night, Benz "walked over to our house and urinated on the house and in the planter." She called the police, who arrived promptly and directed Benz toward his apartment. The local press (the Daily Breeze) ran an article on this incident and quoted Benz as saying that Mrs. Clark wanted to see him urinate. At trial, Benz stated that his comment in the newspaper had been taken out of context, and he denied having urinated on the Clarks' property. However, the trial court expressly found that Benz had engaged in such conduct.

1994, the court found for the Clarks, ruling that their right to due process had been violated. The court also awarded $213,300 in damages ($93,300 for increased development costs, $20,000 for emotional distress, and $100,000 for loss in property value).

In its statement of decision, the court explained that the City had violated the Clarks' rights to procedural and substantive due process because it had arbitrarily denied their permit application without a fair hearing. The court also found that the City had violated the Brown Act (Gov. Code, § 54950 et seq.) since Councilmember Edgerton had held private discussions with three other councilmembers before the public hearing on the appeal from the planning commission.[13] Consistent with its ruling on the writ petition, the trial court again found that Councilmember Benz had a conflict of interest (under the Political Reform Act and the common law) which disqualified him from voting on the Clarks' project. The court also found a violation of the Subdivision Map Act on the theory that the City had applied standards to the Clarks' project that were not then in effect (e.g., a more restrictive, 30-foot height limitation and a new interpretation of the lot coverage requirement). The trial court based its award of damages on federal (42 U.S.C. § 1983) as well as state (Code Civ. Proc., § 1095) law. It authorized the Clarks to recover attorney fees and other litigation expenses, including expert witness fees, pursuant to title 42, United States

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[13] In general, the Brown Act requires that all meetings of the legislative body of a local agency be open and public. (Gov. Code, § 54953, subd. (a).) To that end, the act prohibits "a series of nonpublic contacts at which a quorum of a legislative body is lacking at any given time ... if the contacts are 'planned by or held with the collective concurrence of a quorum of the body to privately discuss the public's business' ...." (*Stockton Newspapers, Inc. v. Redevelopment Agency* (1985) 171 Cal. App.3d 95, 103.)

Code, section 1988(b), Code of Civil Procedure section 1021.5, and Government Code sections 800 and 91012.[14]

In October 1994, the Clarks filed a motion seeking attorney fees (in the approximate amount of $180,000), expert witness fees (in the amount of $6,762.50), and costs (in the amount of $6,211.20).[15] The City opposed the motion. At a November 18, 1994 hearing, the trial court made clear that, despite its previous ruling in the statement of decision, it would not award attorney fees pursuant to Code of Civil Procedure section 1021.5.[16] However, the court reserved decision on whether to award fees pursuant to the other statutes mentioned in the statement of decision. By minute order dated November 23, 1994, the trial court awarded the Clarks $120,921.51 in attorney fees and the requested amounts for expert witness fees and costs. On November 14, 1994, the court

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[14] The prevailing party in a federal civil rights action is entitled to reasonable attorney fees. (42 U.S.C. § 1988(b).) Under Code of Civil Procedure section 1021.5, fees may be awarded where the successful party has enforced an important right affecting the public interest. Government Code section 800 permits an award of fees (not to exceed $7,500) if a party establishes that a public entity has engaged in arbitrary or capricious conduct. Finally, Government Code section 91012 authorizes the prevailing party in an action under the Political Reform Act to recover costs of litigation, including attorney fees.

[15] The request for costs included expenses for photocopying, telephone calls, telecopier use, and computer-assisted research.

[16] As the trial court stated, referring to section 1021.5: "That doesn't apply. CCP 1021.5, this is not attorneys fees in [the] public interest. This is not a public interest case. It was a private citizen situation. I will not grant attorney fees under that section."

entered judgment in favor of the Clarks, incorporating the order granting the writ of mandate and awarding $213,300 in damages and a total of $133,895.21 in attorney fees and costs. The City filed a timely appeal from the judgment.

DISCUSSION

The City contends that the trial court erred in issuing a writ of mandate and that, even if a writ were appropriate, the trial court should have sent the matter back to the City Council for another hearing instead of simply reinstating the planning commission's approval of the permits. We conclude that the Clarks were deprived of a fair hearing before the Council, and, thus, a writ was proper. However, the trial court erred in reinstating the decision of the planning commission. Instead, the writ should have directed the City Council to provide a second, fair hearing on the matter.

As to the Clarks' federal civil rights claim, the City argues that it did not violate the due process clause. We agree. Because the Clarks did not have a protected property interest in the requested permits, the City did not violate the Clarks' right to procedural or substantive due process. In addition, as to the substantive due process claim, we find that the City did not engage in arbitrary or irrational conduct. Consequently, we reverse the finding of liability on the claim brought under title 42, United States Code, section 1983.

I

Writ of Mandate

A trial court may issue a writ of administrative mandate where an agency has (1) acted in excess of its jurisdiction, (2) deprived the petitioner of a fair hearing, or (3) committed a prejudicial abuse of discretion. (Code Civ. Proc., § 1094.5, subd. (b).) "Abuse of discretion is established if the [agency] has not proceeded in a manner required by law, the order or

decision is not supported by the findings, or the findings are not supported by the evidence." (*Ibid.*)

As we see it, this case concerns whether the Clarks received a fair hearing before the City Council. That question is one of law, which we review de novo: "'There might be foundational matters of fact with respect to which the trial court's findings would be conclusive on appeal if supported by substantial evidence. However, the ultimate questions, whether the agency's decision was ... unlawful or procedurally unfair, are essentially questions of law. With respect to these questions the trial and appellate courts perform essentially the same function, and the conclusions of the trial court are not conclusive on appeal.' ... The review of procedural issues, whether presented in mandamus proceedings brought under Code of Civil Procedure section 1085 or 1094.5, should be the same. That is, foundational factual findings must be sustained if supported by substantial evidence; however, the ultimate determination of whether the administrative proceedings were fundamentally fair is a question of law to be decided on appeal." (*Rosenblit v. Superior Court* (1991) 231 Cal.App.3d 1434, 1443, citations omitted.) The trial court's "fair hearing finding was a conclusion of law, not a finding of fact, and requires a de novo review of the administrative record." (Id at p. 1442.)[17]

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[17] In reviewing the propriety of the trial court's writ of administrative mandate, the City contends that we cannot consider any evidence that was not before the City Council at the time of its decision, i.e., not part of the formal administrative record. In particular, the City objects to evidence concerning the approval of, and Mr. Benz's opposition to, the Clarks' 1989 permit application. Such an objection might be well taken if we were determining whether the Council's decision was supported by substantial evidence. (See *Housman v. Board of Medical Examiners* (1948) 84 Cal.App.2d

(continued...)

A. Right to a Fair Hearing

By statute, a writ is appropriate where the petitioner has been deprived of a fair hearing. (Code Civ. Proc., § 1094.5, subd. (b).) In applying this statutory principle, courts have recognized that "an individual has the right to a tribunal 'which meets ... standards of impartiality.' ... Biased decision makers are ... impermissible and even the probability of unfairness is to be avoided.... The factor most often considered destructive of administrative board impartiality is bias arising from pecuniary interests of board members.... Personal embroilment in the dispute will also void the administrative decision ..., although neither prior knowledge of the factual background which bears on a decision nor prehearing expressions of opinions on the result disqualifies an administrative body from acting on a matter before it.... [¶] ... Our Supreme Court has declined to fix rigid procedures for the protection of fair procedure rights ..., but it is inconceivable to us that such rights would not include impartiality of the adjudicators." (*Applebaum v. Board of Directors* (1980) 104 Cal.App.3d 648, 657-658, citations omitted; accord, *Delta Dental Plan v. Banasky* (1994)

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[17] (...continued)
308, 313.) However, where the challenge involves one of procedural fairness, including the potential bias of a councilmember, we are not necessarily limited to the evidence that was before the Council. (See Cal. Administrative Mandamus (Cont. Ed. Bar 1989) § 4.36, p. 120, § 4.120, pp. 171-172; see also *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 573, 575, fn. 5, 578-579 [in reviewing quasi-legislative administrative decision, extra-record evidence may be admissible in determining issue of "procedural unfairness"]; Code Civ. Proc., § 1094.5, subd. (e) [court may consider extra-record evidence where trial court reviews agency decision under independent judgment test].)

27 Cal.App.4th 1598, 1607-1609 [writ of administrative mandate ensures right to "impartial tribunal"]; *Rosenblit v. Superior Court, supra,* 231 Cal.App.3d at p. 1448 ["The right to a fair procedure includes the right to impartial adjudicators."].)

Over 60 years ago, one Court of Appeal discussed the common law prohibition on conflicts of interest, stating: "A public officer is impliedly bound to exercise the powers conferred on him with disinterested skill, zeal, and diligence and primarily for the benefit of the public .... [¶] ... [¶] Actual injury is not the principle the law proceeds on. Fidelity in the agent is what is aimed at, and as a means of securing it the law will not permit him to place himself in a position in which he may be tempted by his own private interests to disregard those of his principal. This doctrine is generally applicable to private agents and trustees, but to public officers it applies with greater force, and sound policy requires that there be no relaxation of its stringency in any case that comes within its reason ...." (*Noble v. City of Palo Alto* (1928) 89 Cal.App. 47, 51, citations omitted.) "[T]he common law doctrine against conflicts of interest ... prohibits public officials from placing themselves in a position where their private, personal interests may conflict with their official duties." (64 Ops.Cal.Atty.Gen. 795, 797 (1981); accord, 70 Ops.Cal.Atty.Gen. 45, 47 (1987).)[18]

A leading treatise on municipal law acknowledges the same concept: "The public is entitled to have its representatives perform their duties free from any personal or pecuniary

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[18] While the Political Reform Act focuses on financial conflicts of interest, the common law extends to noneconomic conflicts of interest. (64 Ops.Cal.Atty.Gen., *supra,* at p. 797; 70 Ops.Cal.Atty.Gen., *supra,* at p. 47.) The common law may be abrogated by express statutory provisions (70 Ops.Cal. Atty.Gen., *supra,* at p. 47; 67 Ops.Cal.Atty.Gen. 369, 381 (1984)), but that is not the situation here.

interest that might affect their judgment. Public policy forbids the sustaining of municipal action founded upon a vote of a council member ... in any matter before it which directly or immediately affects him or her individually.... A finding of self interest sufficient to set aside municipal action need not be based upon actual proof of dishonesty, but may be warranted whenever a public official, by reason of personal interest in a matter, is placed in a situation of temptation to serve his or her own purposes, to the prejudice of those for whom the law authorizes that official to act.... [A]n individual member ordinarily cannot vote on a matter in which that member ... is interested. If the member does, the action taken by the body of which he or she is a member is invalidated.... *Where the vote of a member interested is necessary to pass an ordinance or bylaw, such ordinance or bylaw is void,* irrespective of how beneficial the ordinance may be." (4 McQuillin, The Law of Municipal Corporations (3d ed. rev. 1992) § 13.35, pp. 840-841, italics added, fns. omitted.)

Moreover, "[i]n conducting the hearing, the [Council] ... has power to make final adjudications of fact in connection with matters properly submitted to it. The action of such an administrative board exercising adjudicatory functions when based upon information of which the parties were not apprised and which they had no opportunity to controvert amounts to a denial of a hearing.... Administrative tribunals which are required to make a determination after a hearing cannot act upon their own information, and nothing can be considered as evidence that was not introduced at a hearing of which the parties had notice or at which they were present.... The fact that there may be substantial and properly introduced evidence which supports the [Council's] ruling is immaterial.... A contrary conclusion would be tantamount to requiring a hearing in form but not in substance, for the right of a hearing before an administrative tribunal would be meaningless if the tribunal were permitted to base its determination upon information received without the knowledge of the parties. A hearing

requires that the party be apprised of the evidence against him so that he may have an opportunity to refute, test, and explain it, and the requirement of a hearing necessarily contemplates a decision in light of the evidence there introduced...." (*English v. City of Long Beach* (1950) 35 Cal.2d155, 158-159, citations omitted.)

Applying these principles, we conclude that the Clarks were deprived of a fair hearing in three respects. First, under the common law, Councilman Benz had a conflict of interest in voting on the Clarks' project. In denying the requested permits, the Council majority (which included Benz) found that the height and lot coverage of the proposed structure would interfere with the use or enjoyment of other property in the area. Also, in opposing the Clarks' 1989 application, Benz stated his belief that the project would "further constrict the view of the ocean from homes that are located behind ... the lot." Because Benz lived one block inland of the Clarks, he stood to benefit personally by voting against the Clarks' project. It is irrelevant that Benz did not own his residence; an interest in preserving his ocean view was of such importance to him that it could have influenced his judgment.[19] Of course, a

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[19] We disagree with the trial court's conclusion that Benz violated the Political Reform Act. That act generally prohibits public officials from participating in matters where they have *financial* interest in the outcome. (Gov. Code, § 87100.) No such interest existed here because the act excludes any financial interest in real property *leased* by an official. (Gov. Code, §§ 87103, subd. (b), 82033; Cal. Admin. Code, tit. 2, § 18233.) In addition, we reject the contention that Benz's rent was less than fair market value and that this alleged "gift" from his landlord created a conflict of interest under the act. (See Gov. Code, §§ 87103, subd. (e), 82028.) The Clarks' evidence that Benz's rent was discounted consisted of the rental figures for

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public official may express opinions on subjects of community concern (e.g., the height of new construction) without tainting his vote on such matters should they come before him. (See *City of Fairfield v. Superior Court* (1975) 14 Cal.3d 768, 780-781.) Here, Benz's conflict of interest arose, not because of his general opposition to 35-foot buildings, but because the specific project before the Council, if approved, would have had a direct impact on the quality of his own residence. In addition, Benz's personal animosity toward the Clarks contributed to his conflict of interest; he was not a disinterested, unbiased decisionmaker. (See fn. 12, *ante*.)[20] The City committed a second procedural error in denying the Clarks' permits. The Council's concerns about excessive lot coverage and insufficient open space were raised for the first time *after* the public portion of the March 24, 1992 hearing was over. The Clarks were not permitted to adequately address the Council on those subjects, and their request to reopen the hearing was denied. Accordingly, the Clarks did not receive proper notice or an opportunity to be heard on those two issues, both of which were resolved against them and were cited by the Council as grounds for denying the permits.

Finally, the City exhibited bias in connection with its unsuccessful effort to impose a construction moratorium. In

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[19] (...continued)
their respective dwellings. In this context, rental information on only two dwellings in the City does not establish the fair market value of either one.

[20] We note that "[a] councilman who is disqualified by reason of a conflict of interest in any matter shall not, once the conflict is ascertained, participate in the discussion in any way or comment on the matter in any way to any person including any councilman and shall not vote on such matter." (Hermosa Beach Mun. Code, § 2-2.19.)

February 1992, the Council had attempted, but failed, to enact a moratorium on the construction of buildings higher than 30 feet. The measure fell one vote short of the four votes needed. (See Gov. Code, § 65858.) Consequently, the City's 35-foot height restriction remained in effect in R-3 zones. Yet, shortly after the moratorium failed, the Council and the planning commission denied permits on three projects (including the Clarks') involving 35-foot structures. This sequence of events indicates that the City was attempting to do—by a majority vote on a project-by-project basis—what the law required a four-fifths vote of the Council to accomplish.[21] At a minimum, this evidence establishes that the Council was not impartial to the Clarks' project. In sum, because the City Council deprived the Clarks of a fair hearing, the trial court properly issued a writ of administrative mandate.[22]

B. The Remedy for Denial of a Fair Hearing

The trial court set aside the City Council's decision and ordered the City to reinstate the planning commission's approval of the Clarks' permits. This was error. The trial court

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[21] Our conclusion that the City was implementing an unlawful "backdoor" moratorium is supported by the fact that two of the three grounds for denying the Clarks' permits excessive lot coverage and inadequate usable open space—were first raised by the Council after the public hearing had concluded, without ever giving the public or the Clarks an opportunity to address those issues.

[22] Because we find that the Clarks did not receive a fair hearing, we do not reach any alternative grounds for writ relief (e.g., whether substantial evidence supported the Council's decision or whether the Council violated the Subdivision Map Act (Gov. Code, § 66410 et seq.)).

should have ordered the Council to rehear the matter and to provide the Clarks with a fair hearing.[23]

This conclusion follows from the language of the statute authorizing a writ of administrative mandate: "The court shall enter judgment either commanding [the council] to set aside the order or decision, or denying the writ. Where the judgment commands that the order or decision be set aside, it may order the reconsideration of the case in the light of the court's opinion and judgment and may order [the council] to take such further action as is specially enjoined upon it by law, but the judgment shall not limit or control in any way the discretion legally vested in the [council]." (Code Civ. Proc., § 1094.5, subd. (f).)

In *English v. City of Long Beach, supra,* 35 Cal.2d 155, the petitioner, Henry English, was dismissed from his position as an officer in the Long Beach Police Department. During the subsequent civil service proceeding, the members of the board took evidence outside the hearing. The board upheld English's dismissal. He then sought a writ of administrative mandate.

The superior court found that the civil service board had deprived English of a fair hearing and issued a writ of mandate directing that he be reinstated. The Court of Appeal agreed that the hearing had been unfair but disagreed with the trial court's remedy, stating: "Since the board, in arriving at its decision sustaining the order dismissing English, relied upon information taken outside the hearing, which English had no opportunity to refute, the trial court properly concluded that he was denied a fair hearing. The judgment, however, should not have ordered the reinstatement of English but instead should

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[23] On remand, when the Council rehears the appeal from the planning commission, the requirement of a "fair" hearing necessarily precludes Councilmember Benz from participating in or voting on the matter. (See pt. I.A., *ante* [discussing disqualification based on conflicts of interest].)

have remanded the cause to the civil service board for proper proceedings. (Code Civ. Proc., § 1094.5(e) [now subdivision (f)], ...) The fact that the board has heard and decided the matter does not preclude another hearing even though the charter does not provide for a rehearing, and the board cannot be said to have exhausted its power to act until it has given English a fair hearing." (*English v. City of Long Beach, supra,* 35 Cal.2d at pp. 159-160, citations omitted; accord, *Kumar v. National Medical Enterprises, Inc.* (1990) 218 Cal.App.3d 1050, 1056 ["the setting aside of a final administrative decision because of unfair hearing practices requires a remand for further proceedings"]; *Zurn Engineers v. State of California ex rel. Dept. Water Resources* (1977) 69 Cal.App.3d 798, 835-838 [discussing cases], cert. den. 434 U.S. 985.)

We recognize that there may be situations in which a superior court can properly direct that a city council's decision be set aside and that no further administrative hearings be held in the case, e.g., where the council had no authority to hear an appeal in the first place (*Cohan v. City of Thousand Oaks* (1994) 30 Cal.App.4th 547, 556-559) or where the issuance of a building permit is a purely ministerial act, such that the council has no discretion in the matter (*Gabric v. City of Rancho Palos Verdes* (1977) 73 Cal.App.3d 183, 190-191). However, neither of those exceptions applies here. (See pt. II.A, *post* [discussing City's discretion in ruling on permit applications].)

Finally, the Clarks contend that another hearing before the Council would be improper because Councilmember Benz should have recused himself during the April 14, 1992 meeting, when the Council voted on the resolution denying the Clarks' permits. According to the Clarks, without Benz's participation at that meeting, the resulting tie vote (2-2) would have affirmed the planning commission's decision to approve their project. We disagree. While a tie vote might have affirmed the commission's decision to approve the tentative parcel map, it

would not have had that effect as to the conditional use permit. This result is dictated by the different appeal provisions applicable to the two types of permits.

On appeal from a planning commission decision regarding a conditional use permit, the City Council does not merely review the commission's decision for error. Rather, the Council hears the matter de novo, takes additional evidence at a public hearing, and decides whether it should grant or deny the permit. (Hermosa Beach Mun. Code, §§ 1411, 1412; *Gabric v. City of Rancho Palos Verdes, supra,* 73 Cal.App.3d at p. 191; *Lagrutta v. City Council* (1970) 9 Cal.App.3d 890, 894-895.) In deciding an appeal, the Council "shall order that the conditional use permit be *granted, denied or modified,"* and "[t]he action by the city council ... shall be by *three (3) affirmative* votes." (Hermosa Beach Mun. Code, §§ 1412, 1413, italics added.) In other words, the Clarks needed three affirmative votes in the Council to obtain a conditional use permit. A tie vote would not suffice.. "[A]s a general rule an even division among members of an administrative agency results in no action." (*Graves v. Commission on Professional Competence* (1976) 63 Cal.App.3d 970, 976-977.) Indeed, in construing an ordinance virtually identical to the one here, we have previously held that a city council's tie vote does not affirm the underlying decision of a planning commission. (*Anderson v. Pittenger* (1961) 197 Cal.App.2d 188, 194-195 [on appeal from planning commission's decision to grant a zoning variance, city council's tie vote constituted "no action" and "was not an affirmance of the order of the commission"]; see also *REA Enterprises v. California Coastal Zone Conservation Com.* (1975) 52 Cal.App.3d 596, 605-609 [on appeal from regional commission's decision to issue a development permit, state

commission's tie vote was not an affirmative majority vote to approve permit and therefore constituted denial of permit].)[24]

The Clarks' reliance on *Woodland Hills Residents Assn., Inc. v. City Council* (1975) 44 Cal.App.3d 825, 830-831, and *Pacific Palisades Property Owners Assn. v. City of Los Angeles* (1974) 42 Cal.App.3d 781, 786, is of no avail. Those decisions construed provisions of the Subdivision Map Act which provide that a tentative map shall be deemed to be approved where (1) the city council has "failed to act" upon an appeal within the statutorily specified time period and (2) the planning commission has already approved the map. (See former Bus. & Prof. Code, § 11553, as amended by Stats. 1961, ch.194, § 4, pp. 1202-1203, now Gov. Code, § 66452.4; former Bus. & Prof.

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[24] Under City law, "[t]ie votes shall be lost motions and may be reconsidered." (Hermosa Beach Mun. Code, § 2-2.21.) Here, a tie vote arguably would have been tantamount to "no action" on the appeal. With the votes evenly divided between granting and denying a conditional use permit, a motion either way would have failed for lack of a third vote. In this scenario, the appeal could have remained in perpetual limbo, absent a success fin motion for reconsideration or a renewed motion. On the other hand, because the Council was hearing the matter de nova, a tie vote might have had the effect of denying the conditional use permit, assuming the Clarks had to prove they were entitled to it. (See *Committee for a Rickel Alternative v. City of Linden* (1988) 111 N.J. 192, 196203 [543 A.2d 943, 945-949] [where affirmative vote of majority of city council was required to reverse, remand, or affirm decision of board of adjustment, and council heard matter de nova with burden of proof on applicant, tie vote resulted in denial of use variance].) In any event, without deciding whether a tie vote would have *denied* the conditional use permit, we conclude that it would not have affirmed the planning commission's decision in that respect.

Code, § 11552, as amended by Stats. 1973, ch. 306, § 1, pp. 721-723, now Gov. Code, § 66452.5.) In both cases, the courts found that the city council's tie vote constituted a "failure to act" upon the appeal, thereby affirming the planning commission's approval of the tentative map.

Even assuming—as the Clarks contend—that the City Council's tie vote would have affirmed the planning commission's decision with respect to their tentative parcel map *and* precise development plan, this argument overlooks the significance of the tie vote as to the conditional use permit. The language of the Hermosa Beach Municipal Code, not the Subdivision Map Act, would govern the outcome on that issue. As discussed above, a tie vote of the Council does not affirm the planning commission's decision on a conditional use permit, nor does it operate to grant the permit. The critical provision in the Subdivision Map Act—deeming the map approved if the council fails to act by a certain deadline—does not appear in the municipal code. Rather, City law mandates three affirmative Council votes for a conditional use permit; there is no "deemed approval" provision, nor is there a time limit for acting on the appeal.[25]

Unquestionably, the Clarks needed all three permits—a tentative parcel map, precise development plan, and conditional use permit—to proceed with the project. (See Hermosa Beach Mun. Code, §§ 7.2-4, 29.5-1 to 29.5-18, 1431.) Because a tie vote of the Council would not have affirmed the planning commission's decision as to all three permits, it follows that the

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[25] Although the Council is supposed to announce its decision within 60 days after the public hearing, it is authorized to give notice to the parties that the decision will be announced at some later time. (Hermosa Beach Mun. Code, § 1412.) The municipal code does not impose any ultimate deadline where the Council gives notice that the decision will take more than 60 days.

Clarks' project would not have been approved even if Councilmember Benz had recused himself.

Accordingly, on remand, the trial court shall direct the City Council (1) to vacate its decision on the appeal from the planning commission and (2) to rehear the appeal and provide the Clarks with a fair hearing.[26]

II

Federal Civil Rights Claim

The trial court properly found that the City Council had deprived the Clarks of a fair hearing under state law (Code Civ. Proc., § 1094.5, subd. (b)). The Clarks' civil rights claim was premised on the theory that the lack of a fair hearing also violated the due process clause of the United States Constitution.

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[26] In September 1992, five months after the Clarks' permits were denied, the City Council enacted an ordinance imposing a 30-foot height limitation in R-3 zones. (See fn. 9, *ante.)* The question thus arises as to whether the new height restriction applies to the Clarks' project. Significantly, the new limitation was formally proposed and adopted after the City Council heard the appeal on the Clarks' permits. To allow the City to invoke the new height limitation now would sanction the Council's mishandling of the administrative appeal and would leave the Clarks without a remedy. Accordingly, the height ordinance in effect at the time of the Council's prior decision should apply to the future development of the Clarks' project, absent some state statute dictating otherwise. (See *Ross v. City of Yorba Linda* (1991) 1 Cal.App.4th 954, 968-970; *Gabric v. City of Rancho Palos Verdes, supra,* 73 Cal.App.3d at pp. 202-203; *Keizer v. Adams* (1970) 2 Cal.3d 976, 980-981; see also Gov. Code, §§ 66474.2, 65961; *Golden State Homebuilding Associates v. City of Modesto* (1994) 26 Cal.App.4th 601, 606-610.)

Given that state law mandates a "fair" administrative proceeding and that the due process clause is similarly based on the concept of fairness (*Applebaum v. Board of Directors, supra,* 104 Cal.App.3d at p. 657), it may appear at first blush that a violation of state law in this case should give rise to liability under the federal Constitution.

Obviously, this is not the first attempt by a plaintiff to convert a state law claim into a federal case of constitutional proportions. (See, e.g., *Stivers v. Pierce* (9th Cir. 1995) 71 F.3d 732, 740-741 & fn. 4 [applying due process clause where Nevada state law recognized property interest in occupational license].)[27] However, we conclude that while the City violated state law by failing to provide a fair hearing, it did not offend the federal Constitution, on either procedural or substantive due process grounds.[28]

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[27] The trial court's resolution of the Clarks' civil rights claim followed a three-day bench trial. Accordingly, we apply the substantial evidence test to its findings of fact and independently review its conclusions of law. (See 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, §§ 278-286, pp. 289-298; *Masonite Corp. v. Superior Court* (1994) 25 Cal.App.4th 1045, 1050-1051.)

[28] As the Supreme Court has explained: "This Court has held that the Due Process Clause protects individuals against two types of government action. So-called 'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience,' ... or interferes with rights 'implicit in the concept of ordered liberty,' .... When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner.... This requirement has traditionally been referred to as 'procedural' due process." (*United States v.*

(continued...)

A. Procedural Due Process

A state law requirement that a public entity conduct hearings in a fair manner does not automatically implicate the federal due process clause. The Fourteenth Amendment provides that "[n]o State shall ... deprive any person of life, liberty, or property, without due process of law; ..." Nonetheless, before reaching any question about the fairness of a particular proceeding under the federal Constitution, we must first address whether a protected interest—life, liberty, or property—is implicated. If no such interest is involved, then the procedural protections of the due process clause do not come into play. (*Board of Regents v. Roth* (1972) 408 U.S. 564, 569-578; *Zorzi v. County of Putnam* (7th Cir. 1994) 30 F.3d 885, 895.) Because the Clarks do not contend that the City Council's decision implicated an interest involving life or liberty, we examine whether they had a federally protected property interest in the development of their project.

At the outset, we note that several federal courts have cautioned against applying title 42, United States Code, section 1983 ("section 1983") to state and local land-use disputes. As the Fourth Circuit Court of Appeals has noted: "'[T]he regulation of land subdivision is ... a fundamental legal tool for municipal guidance of land development.' .. . Indeed, land-use decisions are a core function of local government. Few other municipal functions have such an important and direct impact on the daily lives of those who live or work in a community. The formulation and application of land-use policies, therefore, frequently involve heated political battles, which typically pit local residents opposed to development against developers and local merchants supporting it.... [¶] Resolving the routine land-use disputes that inevitably and constantly arise among

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[28] (...continued)
referred to as 'procedural' due process." (*United States v. Salerno* (1987) 481 U.S. 739, 746, citations omitted.)

developers, local residents, and municipal officials is simply not the business of the federal courts. There is no sanction for casual federal intervention into what 'has always been an intensely local area of the law.' ... [A]llowing 'every allegedly arbitrary denial by a town or city of a local license or permit' to be challenged under § 1983 would 'swell[] our already overburdened federal court system beyond capacity.' ... Accordingly, federal courts should be extremely reluctant to upset the delicate political balance at play in local land-use disputes. Section 1983 does not empower us to sit as a super-planning commission or a zoning board of appeals, and it does not constitutionalize every "'run of the mill dispute between a developer and a town planning agency.'"...

In most instances, therefore, decisions regarding the application of subdivision regulations, zoning ordinances, and other local land-use controls properly rest with the community that is ultimately—and intimately—affected." (*Gardner v. Baltimore Mayor & City Council* (4th Cir. 1992) 969 F.2d 63, 67-68, followed in *Sylvia Development Corp. v. Calvert County, Md.* (4th Cir. 1995) 48 F.3d 810, 828-829, citations omitted.)

Similarly, the First Circuit Court of Appeals has commented: "Virtually every alleged legal or procedural error of a local planning authority or zoning board of appeal could be brought to a federal court on the theory that the erroneous application of state law amounted to a taking of property without due process. Neither Congress nor the courts have, to date, indicated that section 1983 should have such a reach. [¶] ... [¶] ... Plaintiffs would thus have us rule that the due process clause to the United States Constitution was violated when [the Town of] Bolton's Planning Board, for the purpose of protecting what it viewed as the town's basic character, openly interpreted state subdivision laws and a state court decision in ways which frustrated plaintiffs' large-scale housing development of a particular design. [¶] ... Every appeal by a disappointed

developer from an adverse ruling by a local ... planning board necessarily involves some claim that the board exceeded, abused or 'distorted' its legal authority in some manner, often for some allegedly perverse (from the developer's point of view) reason. It is not enough simply to give these state law claims constitutional labels such as 'due process' or 'equal protection' in order to raise a substantial federal question under section 1983. As has been often stated, '[t]he violation of a state statute does not automatically give rise to a violation of rights secured by the Constitution.'" (*Creative Environments, Inc. v. Estabrook* (1st Cir. 1982) 680 F.2d 822, 831, 832-833, cert. den. 459 U.S. 989, followed in *Chesterfield Dev. v. City of Chesterfield* (8th Cir. 1992) 963 F.2d 1102, 1104-1105.)

With these cautionary words in mind, we turn to the Supreme Court's analysis in *Board of Regents v. Roth, supra,* 408 U.S. 564, to determine what qualifies as a property interest for due process purposes: "Certain attributes of 'property' interests protected by procedural due process emerge from [our] decisions. To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.... Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." (*Id* at p. 577.)

"When analyzing whether a plaintiff presents a legitimate claim of entitlement, we focus on the degree of discretion given the decisionmaker and not on the probability of the decision's favorable outcome." (*Jacobs, Visconsi & Jacobs v. City of*

Lawrence (10th Cir. 1991) 927 F.2d 1111, 1116.) "Under this approach, whether a property-holder possesses a legitimate claim of entitlement to a permit or approval turns on whether, under state and municipal law, the local agency lacks all discretion to deny issuance of the permit or to withhold its approval. Any significant discretion conferred upon the local agency defeats the claim of a property interest. Under this standard, a cognizable property interest exists 'only when the discretion of the issuing agency is so narrowly circumscribed that approval of a proper application is virtually assured.' ... Moreover, the standard focuses on the amount of discretion accorded the issuing agency by law, not on whether or to what degree that discretion is actually exercised. 'Even if in a particular case, objective observers would estimate that the probability of issuance was extremely high, the opportunity of the local agency to deny issuance suffices to defeat the existence of a federally protected property interest.' ..." (*Gardner v. Baltimore Mayor & City Council, supra,* 969 F.2d at 68, citations omitted; accord, *Crowley v. Courville* (2d Cir. 1996) 76 F.3d 47, 52; *Bateson v. Geisse* (9th Cir. 1988) 857 F.2d 1300, 1303, 1305.)[29]

In this case, we cannot say that the discretion of the City Council was so narrowly circumscribed that approval of the

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[29] This standard "appropriately balances the need for local autonomy in a matter of paramount local concern with recognition of constitutional protection at the very outer margins of municipal behavior. The standard represents a sensitive recognition that decisions on matters of local concern should ordinarily be made by those whom local residents select to represent them in municipal government—not by federal courts. It also recognizes that the Fourteenth Amendment's Due Process Clause does not function as a general overseer of arbitrariness in state and local land-use decisions." (*Gardner v. Baltimore Mayor & City Council, supra,* 969 F.2d at p. 69.)

Clarks' application was virtually assured. The planning commission and the City Council were vested with sufficient discretion to defeat any expectation that the Clarks' application would be approved *as submitted.* In that regard, we think it important to define as precisely as possible the property interest at stake. The Clarks do not (and cannot) claim that the City has infringed their interest in constructing a home per se. The City did not bar the Clarks from building their condominium project altogether; it denied their application without prejudice to submitting a revised plan reflecting the Council's concerns about height, lot coverage, and usable open space. Thus, the interest at issue is not that of a landowner to construct a roof over his head; rather, it is the Clarks' interest in building a structure having the specific dimensions they find desirable. The due process inquiry therefore requires us to examine the discretion accorded the City in placing restrictions on the size of a structure.

As a prerequisite to building their project, the Clarks had to obtain a conditional use permit, a precise development plan, and a tentative parcel map. Under City law, a conditional use permit must "assure that the degree of compatibility shall be maintained with respect to the particular use on the particular site and in consideration of other existing and potential uses within the general area in which such use is proposed to be located." (Hermosa Beach Mun. Code, § 1404.) A precise development plan is designed "to achieve a reasonable level of quality, compatibility, in harmony with the community's social, economic and environmental objectives, and to protect existing and potential developments, and uses on adjacent and surrounding property." (*Id.*, § 1430.)[30]

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[30] A tentative parcel map is required "to insure that the costs of land divisions and the burdens thereof are borne by the property

(continued...)

"All development shall be in compliance with minimum standards of the zoning ordinance." (Hermosa Beach Mun. Code, § 1432(A).) However, "[o]n a case basis, the planning commission may impose standards *above the minimums* designated by the zoning ordinance to improve the quality of development and to mitigate any environmental impacts." (*Ibid.*, italics added.) Further, the decisions of the planning commission are subject to appeal to the City Council. (*Id.*, §§ 29.5-5, 1409, 1435.) Where an appeal involves a conditional use permit, the Council "shall order the ... permit be granted, denied or modified *subject to such conditions or limitations that it may impose.*" (*Id.*, § 1412, italics added.)

Here, the Council's reasons for denying the Clarks' project concerned *minimum* standards, not absolutes or guarantees. Under City law, "[n]o building shall *exceed* thirty five feet in height" (Hermosa Beach Mun. Code, § 601, italics added); "[all buildings ... shall not cover *more than* sixty-five (65) percent of the area of the lot" (*id.*, § 606, italics added); and "there shall be a *minimum* of two hundred (200) square feet of usable open space per dwelling unit," plus an additional 100 square feet per condominium unit (*id*, §§ 607, 7.2-6(e)(1), italics added).

In our view, these provisions do not create a legitimate expectation or claim of entitlement to a structure having any particular dimensions. For instance, the municipal code does not create a *right* to a 35-foot structure; it simply allows a maximum height of 35 feet. In examining permit applications on a case-by-case basis, the City is expressly authorized to consider numerous factors in imposing more restrictive

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[30] (...continued)
owners and those interested in the land and not by the general public." (Hermosa Beach Mun. Code, § 29.5-1.)

conditions on a specific project.[31] Moreover, in this case, even if the Council misinterpreted or misapplied the ordinances concerning lot coverage and usable open space, nothing in the municipal code guaranteed that the Clarks could build to the maximum lot coverage of 65 percent or get by with the minimum open space of 300 square feet per condominium unit.

Indeed, in hearing the appeal on the Clarks' project, the Council had the broad authority to modify the conditional use permit "subject to such conditions or limitations that it may impose."

In sum, the municipal code vests significant discretion in the City in reviewing project applications and in imposing conditions on development permits. (See *Smith v. County of Los Angeles* (1989) 211 Cal.App.3d 188, 197 ["a conditional use permit ... is, by definition, discretionary"]; *Genion v. San Francisco City Planning Com.* (1989) 209 Cal.App.3d 732, 736 ["compliance with the zoning laws and building codes did not entitle [plaintiff] to a building permit as a maker of course"], cert. den. 493 U.S. 936; *Gardner v. Baltimore Mayor & City Council, supra,* 969 F.2d at p. 67 [land-use control "is an

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[31] Some of those factors, as listed in the municipal code, include the distance of the project from existing residential uses and the impact of the proposed use to the City's infrastructure. (Hermosa Beach Mun. Code, § 1432(B).) Of importance, the last of these "general criteria" reads as follows: "Other considerations that, in the judgment of the planning commission, are necessary to assure compatibility with the surrounding uses, and the city as a whole." (*Id.*, § 1432(B)(10).) This language grants the City substantial discretion in deciding whether, and under what conditions, to approve a development project.

inherently discretionary system"].)[32] We therefore join those federal courts recognizing that, in these circumstances, there is no federally protected property interest on which to base a procedural due process claim. (See, e.g., *Jacobs, Visconsi & Jacobs v. City of Lawrence, supra,* 927 F.2d at pp. 1115-1118; *Bateson v. Geisse, supra,* 857 F.2d at p. 1305; *Creative Environments, Inc. v. Estabrook, supra,* 680 F.2d at pp. 829-834; *Arroyo Vista Partners v. County of Santa Barbara* (C.D. Cal. 1990) 732 F.Supp. 1046, 1052-1053.)

Accordingly, the trial court erred in finding a violation of procedural due process.

B. Substantive Due Process

As a substantive limitation on governmental action, the due process clause precludes arbitrary and irrational decision-making. *(Crowley v. Courville, supra,* 76 F.3d at p. 52; *Zorzi v. County of Putnam, supra,* 30 F.3d at p. *895; Gardner v. Baltimore Mayor & City Council, supra,* 969 F.2d at p. 68.) However, not every governmental error constitutes a violation of substantive due process.

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[32] We reject the Clarks' argument that the City's discretion is substantially restricted by the municipal code's criteria for denying a precise development plan. The code states that such a plan can be denied where "[t]he proposed development would substantially depreciate property values in the vicinity or interfere with the use or enjoyment of property in such area, because of excessive dissimilarity or inappropriateness of design in relation to the surrounding vicinity, and *there are no known conditions of approval which can be imposed that could resolve such problems."* (Hermosa Beach Mun. Code, § 1432(C)(1), italics added.) If anything, this provision indicates that the City has substantial latitude in developing and imposing restrictions on a project in order to avoid denying an application altogether.

In fact, given the nebulous contours of substantive due process, courts have begun to restrict its reach to certain "core" values. The Supreme Court has noted: "'As a general matter, the Court has always been reluctant to expand the concept of substantive due process because the guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.' The protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity." (*Albright v. Oliver* (1994) 114 S.Ct. 807, 812.)

The Ninth Circuit Court of Appeals, sitting en banc, has recently echoed this same sentiment: "We are all painfully aware that the area of substantive due process 'has at times been a treacherous field' for the courts.... In an effort to scale back what had become an apparently unbounded source of judicial authority, the Supreme Court in recent decades has restricted the scope of substantive due process. [¶] There can be no doubt that the Due Process Clause of the Fourteenth Amendment confers both procedural and substantive rights.... *However, the use of substantive due process to extend constitutional protection to economic and property rights has been largely discredited*.... Rather, recent jurisprudence restricts the reach of the protections of substantive due process primarily to liberties 'deeply rooted in this Nation's history and tradition.' ... Thus, the Fourteenth Amendment protects against a State's interferences with 'personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education,' as well as with an individual's bodily integrity." (*Armendariz v. Penman* (9th Cir. 1996) 75 F.3d 1311, 1318-1319, citations omitted, italics added.) Consequently, there is some question as to whether substantive due process even applies to the type of case before us.

In any event, assuming that substantive due process remains a viable check on state and local land-use decisions, "a party asserting a deprivation of substantive due process must first

establish a valid property interest within the meaning of the Constitution." *(Crowley v. Courville, supra,* 76 F.3d at p. 52; accord, *Zorzi v. County of Putnam, supra,* 30 F.3d at p. 895; *Gardner v. Baltimore Mayor & City Council, supra,* 969 F.2d at p. 68.) If a cognizable property interest is implicated, a court must then determine whether the government's action was arbitrary or irrational. (*Crowley v. Courville, supra,* 76 F.3d at p. 52; *Zorzi v. County of Putnam, supra,* 30 F.3d at p. 895; *Gardner v. Baltimore Mayor & City Council, supra,* 969 F.2d at p. 68.)

As indicated in our discussion of the Clarks' procedural due process claim, they have no protected property interest in their requested permits. (See pt. II.A, *ante.)* Accordingly, the substantive due process claim fails for that reason alone. Alternatively, even if a constitutionally recognized property interest is involved, we find that the City did not engage in arbitrary or irrational conduct.

In *PFZ Properties, Inc. v. Rodriguez* (1st Cir. 1991) 928 F.2d 28, cert. dism. 503 U.S. 257, a developer ("PFZ") brought a section 1983 action against a Puerto Rico agency for refusing to process its building plans. In rejecting PFZ's substantive due process claim, the First Circuit Court of Appeals stated: "[R]ejections of development projects and refusals to issue building permits do not ordinarily implicate substantive due process.... Even where state officials have allegedly violated state law or administrative procedures, such violations do not ordinarily rise to the level of a constitutional deprivation.... The doctrine of substantive due process 'does not protect individuals from all [governmental] actions that infringe liberty or injure property in violation of some law. Rather, substantive due process prevents "governmental power from being used for purposes of oppression," or "abuse of government power that shocks the conscience," or "action that is legally irrational in that it is not sufficiently keyed to any legitimate state interests."'" (928 F.2d at pp. 31-32, citations

omitted, quoted with approval in *Stubblefield Construction Co. v. City of San Bernardino* (1995) 32 Cal.App.4th 687, 709-710, cert. den. 116 S.Ct. 300.)

Applying these principles in *PFZ Properties*, the First Circuit concluded: "[W]e hold that PFZ's allegations that [government] officials failed to comply with agency regulations or practices in the review and approval process for the construction drawings are not sufficient to support a substantive due process claim under the Fourteenth Amendment to the United States Constitution.... Even assuming that [the agency] engaged in delaying tactics and refused to issue permits for the ... project based on considerations outside the scope of its jurisdiction under Puerto Rico law, such practices, without more, do not rise to the level of violations of the federal constitution under a substantive due process label." (928 F.2d at p. 32, citation omitted.)

In *Uhlrig v. Harder* (10th Cir. 1995) 64 F.3d 567, cert. den. 116 S.Ct. 924, the Tenth Circuit Court of Appeals explained that "the standard for judging a substantive due process claim is whether the challenged government action would "'shock the conscience" of ... judges.' ... [¶] ... [¶] ... [T]o satisfy the 'shock the conscience' standard, a plaintiff must do more than show that the government actor intentionally or recklessly caused injury to the plaintiff by abusing or misusing government power. That is, the plaintiff must demonstrate a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking. The level of conduct required to satisfy this additional requirement cannot precisely be defined, but must necessarily evolve over time from judgments as to the constitutionality of specific government conduct. We do know, however, that the 'shock the conscience' standard requires a high level of outrageousness, because the Supreme Court has specifically admonished that a substantive due process violation requires more than an ordinary tort ...." (*Id.* at pp. 573-574, citing *Collins v. Harker Heights* (1992) 503 U.S. 115, 126,

128.) As the high court has recognized, "The Due Process Clause 'is not a guarantee against incorrect or ill-advised [governmental] decisions.'" (*Collins v. Harker Heights, supra,* 503 U.S. at p. 129.)

In this case, regardless of whether the City Council's decision was proper under state law, we cannot say that its conduct, for due process purposes, was arbitrary or oppressive or that it "shocks the conscience." Although we have concluded that Councilmember Benz had a conflict of interest in voting on the project, the city attorney advised the Council at the public hearing that there was no conflict. That advice was incorrect, but it was not irrational. In light of the city attorney's opinion, the Council did not act irrationally by allowing Benz to participate in the proceedings.[33]

Plainly, the Council erred in considering and deciding issues raised for the first time after the public hearing was over. Further, it *may have* misconstrued or misapplied the provisions of the zoning ordinance concerning lot coverage and usable open space. Nonetheless, the Council's ultimate decision to deny the permits did not lack a rational basis.

The Council's application of the zoning ordinance was not wholly without reason. With respect to limiting the height of the Clarks' structure to 30 feet, there was evidence that most of the homes in the area were 30 feet in height or lower. Similarly, the Council's interpretation and application of the provisions on

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[33] The city attorney's advice was limited to whether there was a conflict of interest based on (1) the proximity of Benz's residence to the Clarks' property and (2) Benz's opposition to the Clarks' 1989 project. No one raised the issue of Benz's personal animosity toward the Clarks (see fn. 12, *ante),* and the city attorney, apparently unaware of that basis for disqualification, did not address it. As far as we can tell, none of the other councilmembers knew about that issue either.

lot coverage and usable open space were not irrational.[34] Moreover, we cannot overlook the fact that several members of the community opposed the Clarks' project, signing petitions to appeal the planning commission's decision and speaking against the project at the City Council hearing. "After all, a legislator is supposed to respond to the concerns of his or her constituents .... Whether their concerns were proper or justified is not the issue here. The point is that their elected representative[s] decided to oppose the project .... 'The opinion of area residents concerning neighborhood preservation is an appropriate factor for consideration in zoning decisions.'" (*Stubblefield Construction Co. v. City of San Bernardino, supra,* 32 Cal.App.4th at p. 711.)

In sum, because the City Council's decision did not implicate a protected property right, and because its conduct was not irrational, the trial court erred in finding a violation of substantive due process.[35]

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[34] We agree with the City that the planning commission's interpretation of the lot coverage provision is not binding on the Council. To hold otherwise would defeat the purpose of allowing an appeal from the commission to the Council.

[35] As stated, in addition to finding that the Clarks' due process rights were violated, the trial court also found that Councilmember Benz had violated the Political Reform Act and that the Council had violated the Brown Act and the Subdivision Map Act. Even if these state statutes were violated, such misconduct would add nothing to the Clarks' section 1983 claim. "Only *federal* rights, privileges, or immunities are protected by the section. Violations of state law alone are insufficient." *(Ybarra v. Bastian* (9th Cir. 1981) 647 F.2d 891, 892, cert. den. 454 U.S. 857, italics added; accord, *Ebmeier v. Stump* (8th Cir.1995) 70 F.3d 1012, 1013 & fn. 6; *Love v.*

(continued...)

III

Damages

The trial court awarded damages pursuant to the state statutory scheme authorizing writs of mandate (Code Civ. Proc., §§ 1084-1097) and the federal civil rights statute (section 1983). Since we have found that a writ was appropriate but that the City did not violate section 1983, the damages award rests solely on the writ of mandate statute.

Code of Civil Procedure section 1095 governs the award of damages in a writ of mandate proceeding. It states: "If judgment be given for the applicants the applicant may recover the damages which the applicant has sustained, as found by the jury, or as may be determined by the court or referee, upon a reference to be ordered together with costs; and a peremptory mandate must also be awarded without delay. Damages and costs may be enforced in the manner provided for money judgments generally... ."

The Clarks' damages were proximately caused, if at all, by the Council's decision to deny their requested permits. As a result, the immunity afforded by Government Code section 818.4 is applicable. That statute provides: "A public entity is not liable for an injury caused by the issuance, denial, suspension or revocation of, or by the failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order, or similar authorization where the public entity or an employee of the public entity is authorized by enactment

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[35] (...continued)
Pepersack (4th Cir. 1995) 47 F.3d 120, 124, fn. 5, cert. den. 116 S.Ct. 64.)

to determine whether or not such authorization should be issued, denied, suspended or revoked."[36]

While Government Code section 818.4 applies only to discretionary acts (*Slagle Constr. Co. v. County of Contra Costa* (1977) 67 Cal.App.3d 559, 562-563), we have already found that the City's review of the Clarks' application involved a discretionary activity. (See pt. II.A., *ante.)* We therefore agree with the principle that, in cases involving development permits, "the specific immunities provided for the public entities ... in section[] 818.4 ... take precedence over the liabilities established in Code of Civil Procedure section 1095." (*O'Hagan v. Board of Zoning Adjustment* (1974) 38 Cal.App.3d 722, 731; accord, *Thompson* v. *City of Lake Elsinore* (1993) 18 Cal.App.4th 49, 54-57; *Slagle Constr. Co. v. County of Contra Costa, supra,* 67 Cal.App.3d at pp. 562-563.)

Thus, the trial court improperly awarded damages.[37]

IV

Attorney Fees and Costs

The City challenges the trial court's award of attorney fees, expert witness fees, and certain litigation expenses. We agree with the City's position on these issues.

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[36] In its answer to the petition/complaint, the City raised as its "third affirmative defense" the immunity afforded by Government Code section 818.4. Consequently, the City did not waive that defense.

[37] The Clarks have requested an award of additional "interim" damages (e.g., ongoing carrying costs) incurred during the pendency of this appeal. Since we have concluded that no damages were appropriate, this request is denied.

A. Attorney Fees

The trial court arguably awarded attorney fees pursuant to four separate statutory provisions. We discuss each in turn, concluding that fees should not have been awarded.

The principal basis for the fee award was title 42, United States Code, section 1988(b), which authorizes an award of fees to the prevailing party in a section 1983 action. Because we have concluded that the Clarks should not have prevailed on their federal civil rights claim, section 1988(b) does not provide a basis for attorney fees.

Second, the Clarks maintain that fees were authorized and awarded pursuant to Code of Civil Procedure section 1021.5.[38] However, at the hearing on the Clarks' motion for attorney fees, the trial court expressly rejected this basis for fees, stating that the case did not involve an important right affecting the public interest. Rather, it was a private citizen dispute which did not confer a significant benefit on the general public or a large class of persons. We agree with the trial court's conclusion on this point.

Third, the statement of decision indicated that fees were being awarded pursuant to Government Code section 91012, which authorizes fees to the prevailing party under the Political

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[38] That statute provides in part: "Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any."

Reform Act. However, we have determined that there was no violation of that act. (See fn. *ante.)* Section 91012 therefore did not provide a basis for a fee award.

Finally, the trial court awarded fees pursuant to Government Code section 800, which states that "[i]n any civil action to appeal or review the award, finding, or other determination of any administrative proceeding under this code or under any other provision of state law, ... where it is shown that the award, finding, or other determination of the proceeding was the result of *arbitrary or capricious* action or conduct by a public entity or officer thereof in his or her official capacity, the complainant if he or she prevails in the civil action may collect reasonable attorney's fees, ... not to exceed seven thousand five hundred dollars ($7,500), ... from the public entity, in addition to any other relief granted or other costs awarded...." (Italics added.)

"'... The phrase 'arbitrary or capricious' encompasses conduct not supported by a fair or substantial reason, a stubborn insistence on following unauthorized conduct, or a bad faith legal dispute.' ... Attorney's fees may not be awarded simply because the administrative entity or official's action was erroneous, even if it was 'clearly erroneous.'" (*Stirling v. Agricultural Labor Relations Bd.* (1987) 189 Cal.App.3d 1305, 1312, citation omitted.) "An arbitrary act is one done without any apparent reason therefor." (*Verdugo Hills Hospital, Inc. v. Department of Health* (1979) 88 Cal.App.3d 957, 964.)

Although the standard for assessing arbitrary and capricious conduct under Government Code section 800 is not identical to the standard used in evaluating irrational behavior under the due process clause (see pt. II.B., *ante),* the two standards are not so dissimilar as to require a different result in this case. While the decisions or actions of certain City officials may have been erroneous, perhaps clearly so, we cannot conclude that the ultimate decision to deny the Clarks' permits was "done without any apparent reason therefor." *(Verdugo Hills Hospital, Inc. v. Department of Health, supra,* 88 Cal.App.3d at p. 964.)

It follows that an award of fees was not permitted under section 800.

Thus, the trial court erred in awarding attorney fees.[39]

B. Costs

Because none of the foregoing attorney fee statutes is applicable, the Clarks' request for expert witness fees and other costs is based entirely on Code of Civil Procedure section 1033.5. Under that statute, expert witness fees and expenditures for photocopying, postage, telecommunications, and computer-assisted research are not recoverable. (Code Civ. Proc., § 1033.5, subd. (b); see *Ripley v. Pappadopoulos* (1994) 23 Cal.App.4th 1616, 1624-1628.) Thus, on remand, the trial court should eliminate those items from the award of costs.

DISPOSITION

The judgment is reversed. On remand, the trial court is directed to issue a writ of administrative mandate commanding the Hermosa Beach City Council (1) to set aside its decision overturning the planning commission's approval of the Clarks' project, (2) to rehear the appeal from the planning commission's decision, and (3) to provide the Clarks with a fair hearing on the matter. The trial court is further directed to recalculate the costs recoverable by the Clarks in accordance

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[39] The Clarks seek attorney fees on appeal based on these same four statutory grounds. In light of our conclusion that none of them is applicable, the request for fees on appeal is without merit.

with Code of Civil Procedure section 1033.5. The parties are to bear their respective costs on appeal.

CERTIFIED FOR PARTIAL PUBLICATION.

MASTERSON, J.

We concur:

SPENCER, P. J.

VOGEL (Miriam A.), J.

Appendix B-1

Filed 9/11/96

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

DOUGLAS A. CLARK et al.,	B089504
Plaintiffs and Respondents,	(Super. Ct No. YS002665)
v.	ORDER MODIFYING OPINION AND DENYING REHEARING [NO CHANGE IN JUDGMENT]
CITY OF HERMOSA BEACH et al.,	
Defendants and Appellants.	

THE COURT:

It is ordered that the opinion filed herein on August 21, 1996, be modified in the following particulars:

1. On page 7 [App. A-8], in footnote 4, add the words "on a month-to-month basis" at the end of the last sentence. The modified sentence will then read:

> As of March 1992, Benz still lived in the same location (2901 Manhattan Avenue), where he leased a three-bedroom apartment on a month-to-month basis.

2. On page 20 [App. A-22], in footnote 19, lines 4-5, remove the italics from the word "leased" and add the words

"on a monthly basis" at the end of the sentence. The modified sentence will then read:

> No such interest existed here because the act excludes any financial interest in real property leased by an official on a monthly basis.

3. On page 22 [App. A-25], in footnote 23, add the following material at the end of the footnote (after "interest].)"):

> The Clarks urge us to find that, in addition to Benz, Councilmember Edgerton is biased against them and should be disqualified. However, because this issue was not raised below on the petition for writ of mandate, we decline to reach it on appeal. (See *California Indemnity Ins. Premium Finance Co. v. Fireman's Fund Ins. Co.* (1995) 40 Cal.App.4th 1633, 1641.) If the Clarks believe that any councilmember other than Benz should be disqualified in connection with the new hearing, they can raise that point during the administrative proceedings after remand.

4. On page 22, line 11 (at the beginning of the third full paragraph) [App. A-25, line 3--beginning of first full paragraph], replace "This conclusion" with "The necessity of another hearing".

There is no change in the judgment.

Respondents' petition for rehearing is denied.

CERTIFIED FOR PUBLICATION.

SPENCER, P.J. **VOGEL (M), J.**

SPENCER, P.J. VOGEL (MIRIAM A.), J.

Appendix C-1

Filed 11/14/94

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DOUGLAS A. CLARK and CHERYL CLARK, Plaintiffs/Petitioners, vs. CITY OF HERMOSA BEACH, THE CITY COUNCIL OF THE CITY OF HERMOSA BEACH, and DOES 1 through 25, inclusive, Defendants/Respondents.	CASE NO.: YS002665 ASSIGNED FOR ALL PURPOSES TO: JUDGE JEAN E. MATUSINKA DEPARTMENT B ~~[PROPOSED]~~ STATEMENT OF DECISION (Civil Rights and Damage Proceedings, CCP § 1095; 42 USC § 1983)

The above-entitled cause came on for trial on October 3, 1994 in Department B of the above-entitled Court, the Honorable Jean E. Matusinka, Judge, presiding without a jury, and was tried on that date, as well as on October 4 and 7, 1994. M. Katherine Jenson and Mark A. Thompson appeared for Plaintiffs/Petitioners Douglas A. Clark and Cheryl Clark ("Clarks"). Roger Springer appeared as counsel for Defendants/Respondents City of Hermosa Beach and the City Council for the City of Hermosa Beach (collectively "City"). The trial had been continued from August 30, 1994, on the motion of the City, which was unprepared to proceed. This proceeding was held pursuant to Code of Civil Procedure Section 1095 and 42 U.S.C. Section 1983.

Special proceedings had been held on the petition for writ of mandate brought pursuant to Code of Civil Procedure Section 1094.5 stated in the First Amended Complaint/Petition on August 29, 1994. The Petition was decided in the Clarks' favor on August 30, 1994.

In this subsequent proceeding, oral and documentary evidence was introduced on behalf of the respective parties and the cause was argued and submitted for decision on October 7, 1994. The Court, having considered the evidence and heard and read the arguments of counsel and being fully advised, issued the following statement of decision:

At the close of the trial on October 7, 1994, counsel for the City orally requested that a statement of decision be prepared. However, counsel did not at that time, or within the time period specified in California Rule of Court 232(b), specify controverted issues on which a statement of decision is desired, as required by Code of Civil Procedure Section 632. The request for a statement of decision is therefore defective.

The following statement of decision addresses only the primary issues raised in the cause. Not all of the findings in support of the Court's ruling are set forth herein, however, since no request was made therefor. Moreover, this statement

of decision does not address the Court's decision in the special proceedings on petition for writ of mandate. The City failed to request a statement of decision in a timely manner during those proceedings, and further failed to specify the issues raised in those special proceedings as part of this request for a statement of decision. The Court's prior determination on the petition for writ of mandate is reflected in the Order Granting Peremptory Writ of Mandate and the Writ of Mandate, dated August 31, 1994, and is based upon the Administrative Record.

I. With regard to the issue of whether the City deprived the Clarks of life, liberty, or property without due process of law under color of law in violation of 42 U.S.C. § 1983, the Court's decision is in the affirmative.

A. The Court based its decision on, among others, the following facts:

On March 24, 1992, the Hermosa Beach City Council granted an appeal ("Appeal") from the Hermosa Beach Planning Commission's approval of an application for a Conditional Use Permit ("CUP"), a Precise Development Plan and Vesting Tentative Parcel Map #20554 (collectively, the "Project") submitted by the Clarks. The Clarks and their architect worked closely with City Staff in preparing and refining the Project. The Clarks' Project met all conditions and City Staff confirmed that the Project was in full compliance with all City requirements. The Project was approved by the Planning Commission without dissent. At the hearing on the Appeal, however, the City Council considered evidence and arguments which were not submitted to or known by the Clarks and of which the Clarks were not apprised and which they had no opportunity to controvert or even address. The Clarks were not given adequate notice of or an opportunity to be heard regarding the issues on which the City Council relied in granting the Appeal.

Specifically, at the March 24, 1992, hearing on the Appeal, the City Council adopted a new interpretation of its lot coverage ordinance. It rejected the prior interpretation which had been consistently followed for seven or more years. The Clarks' Project is the only project to which the new interpretation has ever been applied. Under the original interpretation, the Clarks' Project was in full compliance. The new interpretation of the City's lot coverage requirements was raised for the first time after the public hearing was closed. The City Council then refused to reopen the public hearing so the Clarks could address the new issue. The City Council also imposed a lower height limit on the Clarks' Project than provided for by the City's zoning laws and also declined to reopen the hearing to allow the Clarks to address this surprise move.

The Clarks were also denied a fair hearing due to the fact the City Council was not an impartial body in that Councilmember Robert Benz had a conflict of interest due to the close proximity (135 feet inland) of his long-term residence to the Clarks' proposed Project.[1] Based upon the rental survey

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[1] In ruling on the Administrative Writ of Mandate, the court previously determined that by participating in the decision on the appeal of the Planning Commission's approval of the Clarks' project, Councilmember Benz violated the provisions of the Political Reform Act, ("PRA"), Government Code § 81000, et seq. and the regulations promulgated thereunder, Title 2, California Code of Regulations, Section 18700 et seq., and further that he had a common law conflict of interest. The court's determination on the writ of mandate cause of action is entitled to preclusive effect in ruling on the civil rights cause of action. (Mata v. City of Los Angeles (1993) 20 Cal.App.4th 141, 147-148) However, both sides were permitted to present additional evidence on all issues, which the Court fully considered.

presented by the City's appraiser, it also appears that Councilmember Benz was paying below market rent as of 1992. The Court further finds that Councilmember Benz was biased against the Clarks due to the fact he was a close personal friend of a former tenant of the Clarks who would have ultimately been displaced by the Project. Councilmember Benz also displayed bias against the Clarks personally by his conduct prior to the Appeal. Just one year prior to his election to the City Council, he had circulated five petitions against the Clarks' 1989 project, which was nearly identical to the 1992 Project, on the basis of its height and its purported impact on his view, and he had accused the City of "wanton disregard" for his and others' property rights in approving this earlier version of the project. It was Benz who showed such disregard for property rights, by such conduct as urinating on the Clarks' home.

In participating in the decision on the Appeal, Councilmember Benz, along with Councilmember Edgerton, initially voted to approve the Project subject only to a reduction in height. He later voted in favor of the resolution which passed denying the Clarks' Project; that resolution stated in part: "the requested development at the height and lot coverage ratio proposed is likely to interfere with ... the use or enjoyment of property in such area." Councilmember Benz, of course, lived in that "area." While there was conflicting evidence presented on Councilmember Benz' antagonism towards the Clarks, the Court finds the witnesses and testimony presented by the Clarks on this issue and other contested issues to be more credible than that presented by the City.

The City Council was also not impartial in that Councilmember Edgerton, who was strongly opposed to the Clarks' Project, prior to the City Council meeting at which the Appeal was decided, contacted three other members of the City Council to discuss with them his objections to the Clarks' Project. According to the testimony of former Councilmember

Essertier, Councilmember Edgerton expressed animosity toward the Clarks due to their out of state resident status. Thus, it appears that Councilmember Edgerton was predetermined against the project, prior to the public hearing. Prior to the Planning Commission meeting at which the Clarks' Project was approved, Councilmember Edgerton also contacted one of the Planning Commissioners, Joe DiMonda, and attempted to pressure him to use his influence to have the Clarks' Project denied.

Councilmember Edgerton also displayed personal hostility and predetermination against the Clarks and their Project. He indicated to Mrs. Clark in a telephone conversation prior to the hearing on the Appeal that he had already made up his mind against the Project and inquired as to whether the Clarks' children were enrolled in Hermosa Beach Schools, which related directly to his discrimination against the Clarks for being from out of state.

As with Councilmember Benz' bias, although there was conflicting evidence presented on Councilmember Edgerton's antagonism and bias towards the Clarks and their Project, the Court finds the witnesses and testimony presented by Clarks on this issue to be more credible than that presented by the City.

Here, due to their personal antagonism and bias towards the Clarks and their Project, Councilmembers Benz and Edgerton were so personally embroiled in the controversy surrounding the Clarks' Project that they should have disqualified themselves. Further, based on the evidence, the Court finds that the Clarks were discriminated against, at least in part, because they were residing in another state at the time the Appeal came before the City Council.

In short, the Court finds the evidence preponderates in favor of a determination that there was an intolerably high probability of actual bias against the Clarks and their Project on the part of the decision maker.

The Clarks' procedural due process rights were also violated by the City's retroactive application of the City Council's new interpretation of the City's lot coverage ordinance and the application of a proposed height limit. The Court notes that just prior to the granting of the Appeal, a proposed moratorium on buildings over 30 feet in height had failed because only three Councilmembers voted in favor of it, rather than the four required for such a moratorium. (Gov't Code § 65858.) Under the Subdivision Map Act, Government Code § 66410 et seq., in acting upon the Clarks' Project, the City was permitted to "apply only those ordinances, policies, and standards in effect on the date the [City] has determined that the application is complete...." (Gov't Code § 66474.2(a), emph. add.; see also §§ 66498.1 and 66498.9(a).)

Here, the City applied new "policies" or "standards" to the Clarks' Project after their application was complete, in derogation of the above referenced statutes, by denying the Project on the basis of a more restrictive height limitation which was not in effect when the Clarks' application was deemed complete and by overturning without notice the long-standing interpretation of the lot coverage requirements which had been consistently applied since 1985.

In applying the more restrictive 30-foot height limit, the three councilmembers who voted in favor of granting the Appeal were in effect imposing, on an ad hoc basis, a moratorium on buildings over 30 feet.

The Court also finds, as it did in ruling on the petition for writ of mandate, that the findings made by the City Council in granting the Appeal of the Planning Commission's approval of the Clarks' Project, were not supported by substantial evidence.

Additionally, the Clarks' substantive due process rights were further violated by the City's actions in that the City Council's actions in granting the Appeal of the Planning Commission's approval of the Clarks' Project was wrongful,

discriminatory, arbitrary and capricious and an abuse of the City Council's discretion in that at least a portion of the Council, including a majority of the three individuals who voted in favor of granting the Appeal, were biased against the Clarks and their Project.

The Court finds that the Clarks' property is located in the middle of a several block stretch of properties zoned and developed to R-3 standards. For approximately ten years before the City's denial of the Clarks' Project, all new or recycled development in the neighborhood surrounding the Clarks' property had been built to the maximum heights permitted by the City code. The Staff Report to the Planning Commission described the surrounding area and the proposed Project's consistency therewith:

> The surrounding area consists of primarily multi-family developments of various ages and styles, and is high density in character. The proposed project would not be inconsistent with the area.

The Court finds there is a 35-foot structure immediately next door to the north, up to 30-foot structures to the east, and that the building average heights in the area are up to 30 feet, although they run as high as 40 feet.

The Court further finds that in 1989, in approving a virtually identical project for the same location, the City found "the site is ... physically suited for the proposed development," and the development would be "compatible with adjacent residential properties...." The City offered no explanation of what, if anything, had changed in the intervening three years to justify the opposite finding.

B. The legal basis for the Court's decision includes the following:

THE CLARKS HAVE PROPERLY STATED CLAIMS OF PROCEDURAL AND SUBSTANTIVE DUE PROCESS VIOLATIONS

The contention advanced by the City, that the Clarks were required to allege and prove a pattern or policy of civil rights violations on the part of the City is without merit. "Local governing bodies ... can be sued directly under § 1983... where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." (Monell v. Dept. of Social Services (1978) 436 U.S. 658, 690, [56 L.Ed.2d 611, 635, 98 S.Ct. 2018]) (Emph. add.) Because the City Council's actions in granting the Appeal were official decisions and actions, there is no need to allege or prove a pattern or policy of civil rights violations. (Ibid; Pembaur v. Cincinnati (1986) 475 U.S. 469, 89 L.Ed.2d 452, 106 S.Ct. 1292.)

PROCEDURAL DUE PROCESS

1. The Clarks' Property Interest in Their Project was Entitled to Constitutional Protection.

Although the City urged otherwise, the Clarks had a sufficient property interest in their Project to entitle them to procedural due process. Under the Subdivision Map Act, Government Code § 66410 et seq., in acting upon the Clarks' application for Vesting Tentative Parcel Map #20554, the City was permitted to "apply only those ordinances, policies, and standards in effect on the date the [City] has determined that the application is complete...." (Gov't Code § 66474.2(a), emph. add.; see also §§ 66498.1 and 66498.9(a).) Similarly, the Clarks' application for their "Precise Development Plans" was subject to extensive local regulation. Section 1432(C) of the Hermosa Beach Municipal Code sets forth the criteria for denial of the plans. Only two criteria are listed, and a finding under either of them is invalid unless there were substantial evidence to support it. (Code Civ. Proc. § 1094.5(b).)

Additionally, the Clarks' Conditional Use Permit ("CUP") was also subject to extensive local regulation. (See Hermosa Beach Muni. Code § 1403 et seq.) Thereunder, a

CUP may be denied only after a formal report is prepared which recites the facts and reasons that denial is necessary. (Id., § 1406.) To be upheld, the facts and reasons must be supported with substantial evidence in the record. (Topanga Assn. for a Scenic Community v. County of Los Angeles (1974) 11 Cal.3d 506, 514-515.)

Thus, the City Council did not have unbridled discretion in acting upon the Clarks' permits. Taken together, the state and local limitations on the City Council's discretion in this case created an "'articulable standard' sufficient to give rise to a legitimate claim of entitlement." The Clarks clearly had more than a mere "abstract need or desire," or "unilateral expectation." (Parks v. Watson (9th Cir. 1983) 716 Fed.2d 646, 656-657.) Rather, the local and state regulation of the permit process "placed significant substantive restrictions on the [City Council's] actions so as to confer due process rights." (Ibid.) Accordingly, the Clarks had a constitutionally cognizable property interest in their Project.

2. Lack of Notice and an Opportunity to be Heard Constitutes a Violation of Procedural Due Process.

A fundamental tenet of due process is that the affected parties have a right to review and argue the evidence upon which the decision is based. A "reasonably fair hearing" cannot be based on "evidence not submitted to or known by the other side." (Corcoran v. San Francisco City and County Employees' Retirement System (1952) 114 Cal.App.2d 738, 745.) The action of a City Council on a quasi-adjudicatory issue, as here, when based on information, either in whole or in part, "of which the parties were not apprised and which they had no opportunity to controvert amounts to denial of a hearing." (English v. City of Long Beach (1950) 35 Cal. 2d 155, 158.) An individual's right to a fair hearing is abridged by an agency's receipt of additional evidence after the hearing is closed. Action by the agency in such circumstances constitutes a denial of due process of law. (See, e.g., La

Prade v. Dept. of Water and Power (1945) 27 Cal.2d 47, 51; Gore v. Board of Medical Quality Assurance (1980) 110 Cal.App.3d 184, 192.)

By waiting to raise the issue of lot coverage and open space until after the close of the public hearing, and then not allowing the Clarks to address these issues, the City violated the Clarks' procedural due process rights.

3. The Biases of Individual Councilmembers Denied the Clarks an Impartial Decision Maker, in Violation of Their Procedural Due Process Rights.

Hearings such as the Appeal of the Clarks' Project "must be before an impartial body or officer." (B. Witkin, Summary of California Law (9th ed. 1988) Constitutional Law, § 527 at 730.) As set forth above, Councilmember Benz at all relevant times lived near the Clarks' property, within 135 feet. Although Councilmember Benz rents his residence on a month-to-month basis, as he has done for over 11 years, he nevertheless has an obvious and substantial conflict of interest. As stated above, it appears he pays below market rent. Moreover, the City Council's own resolution, in favor of which Councilmember Benz voted, stated in part: "the requested development at the height and lot coverage ratio proposed is likely to interfere with ... the use or enjoyment of property in such area." Councilmember Benz, of course, lived in that area and therefore had an obvious conflict of interest.

Councilmember Benz' petitions against the Clarks' 1989 project based on its height, his accusations at that time that the City acted in "wanton disregard" for his and others' property rights, his close personal friendship with the Clarks' former tenant, and other actions and statements by Councilmember Benz which were testified to at trial, including his urination on the Clarks' home, further indicate that he had a strong conflict of interest based on his antipathy towards both the Clarks personally and their Project.

Councilmember Benz' bias and self-interest precluded the Clarks from receiving a fair hearing. Where "the probability of actual bias on the part of the...decisionmaker is too high" it is not "constitutionally tolerable." (Withrow v. Larkin (1975) 421 U.S. 35, 47; 43 L.Ed.2d 712, 723.) While expressing his or her opinion on a matter of general public interest prior to a hearing may not, in and of itself, disqualify a councilmember from voting on a matter, when the official has a pecuniary interest in the proceeding or has become "personally embroiled" in the controversy, disqualification is appropriate. (Mennig v. City Council of Culver City (1978) 86 Cal.App.3d 341, 350-351; see also McQuillen, 4 Law of Municipal Corporations (1992) § 13.22 at 840-841.)

Here, Councilmember Benz was not simply making good on campaign promises to his constituents. (Cf. City of Fairfield v. Superior Court (1975) 14 Cal.3d 768, 780-781.) Councilmember Benz' self-interest and bias against the Project, as demonstrated by his personal embroilment in the controversy over the height of this Project located 135 feet from his home--and directly between his home and the ocean--establish he was simply not impartial. Since his ended up to be the deciding vote, his bias directly injured the Clarks.

Similarly, Councilmember Edgerton's conduct deprived the Clarks of a fair hearing. Councilmember Edgerton displayed personal dislike of the Clarks and their Project. He indicated to Mrs. Clark in a telephone conversation prior to the hearing on the Appeal that he had already made up his mind against the Project.

Further, by contacting three of the four other Councilmembers to discuss his thoughts on the Clarks' Project, he violated the provisions of the Brown Act, Government Code § 54950, et seq. As stated in Stockton Newspapers, Inc. v. Redevelopment Agency of the City of Stockton (1985) 171 Cal.App.3d 95, 102: "An informal conference or caucus permits crystallization of secret decisions to a point just short

of ceremonial acceptance. There is rarely any purpose to a nonpublic pre-meeting conference except to conduct some part of the decisional process behind closed doors." Stockton Newspapers also makes it clear that meetings conducted serially, with one person conferring with councilmembers seriatim, does not exempt the communications from the act because less than a quorum is communicating at any one time. (Id. at 102-103.) Serial meetings such as those described by Councilmember Edgerton are specifically prohibited by Government Code Section 54952.2(b), which states: "... any use of direct communication ... that is employed by a majority of the members of the legislative body to develop a collective concurrence as to action to be taken on an item by the members of the legislative body is prohibited."

In Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors (1968) 263 Cal.App.41, 47, the Court of Appeal stated:

> Section 54950 is a deliberate and palpable expression of the act's intended impact. It declares the law's intent that deliberation as well as action occur openly and publicly. Recognition of deliberation and action as dual components of the collective decision-making process brings awareness that the meeting concept cannot be split off and confined to one component only, but rather comprehends both and either.

Councilmember Edgerton's discussions of the Clarks' Project with three of the four other councilmembers prior to the March 24, 1992, meeting easily satisfies the definition of "deliberation":

> To "deliberate" is to examine, weigh and reflect upon the reasons for or against the choice. Public choices are shaped by reasons of fact, reasons of policy or both. Any of the agency's functions may include or depend upon the ascertainment of facts.

> Deliberation thus connotes not only collective discussion, but the collective acquisition and exchange of facts preliminary to the ultimate decision.

(Ibid; see also Frazer v. Dixon Unified School Dist. (1993) 18 Cal.App.4th 781, 796-798.) Thus, the Clarks' due process rights to a fair hearing were further denied due to the fact that the Brown Act was not complied with.

Aside from the Brown Act violation, however, the evidence preponderates in favor of a determination that due to his personal dislike of the Clarks and their project, Councilmember Edgerton had predetermined his vote on the Appeal prior to the hearing, further depriving the Clarks of a fair hearing. As stated above, such hearings "must be before an impartial body or officer." Here, there was not an impartial body deciding the Appeal.

4. The Application Of The New Development Standards To The Clarks' Project Violated Their Right To Procedural Due Process And The Subdivision Map Act.

By imposing a proposed 30-foot height limitation which had not yet been adopted by the City and by retroactively applying a new interpretation of the lot coverage requirement on the Clarks' Project, the bare Council majority violated the Clarks' procedural due process rights and the Subdivision Map Act.

Under the Subdivision Map Act, Government Code § 66410 et seq., the City was permitted to "apply only those ordinances, policies, and standards in effect on the date the [City] has determined that the application is complete... ." (Gov't Code § 66474.2(a), emph. add.; see also §§ 66498.1 and 66498.9(a).) The application by the City of policies and standards different than those in effect on the date the application was complete constitutes a violation of the Clarks' procedural due process rights. (See, e.g., Bright

Development v. City of Tracy (1993) 20 Cal.App.4th 783, 798; Kaufman & Broad Central Valley, Inc. v. City of Modesto (1994) 25 Cal.App.4th 1577, 1579-1580.)

Even apart from the protections provided by the Subdivision Map Act, the evidence shows that the City was playing fast and loose with its ordinances, policies, and standards in a way that offends the "ordinary sense of fair play." (Gabric v. City of Rancho Palos Verdes (1977) 73 Cal.App.3d 183, 202-204.) Here, as in Gabric,

> [the Clarks are] not a developer of a large tract, bulldozing down trees and homes and shrubbery and changing the neighborhood from a pleasant residential neighborhood to a busy shopping center or other commercial profit-seeking enterprise... . Nothing in the evidence demonstrates that [the Clarks'] home will be less attractive than the others.

One of the "policies or standards" in effect when the Clarks' applications were deemed complete, was the City's long-standing interpretation of its lot coverage ordinance, pursuant to which the Clarks' Project was in full compliance with all lot coverage requirements. There is a presumption that long-standing administrative interpretations are correct. (Robinson v. Fair Employment & Housing Com. (1992) 2 Cal.4th 226, 234; see also Flavell v. City of Albany (1993) 19 Cal.App.4th 1846, 1851.) While a city may change its ordinances, policies, and standards, it must do so in a manner consistent with due process. In this case the City failed to do so.

SUBSTANTIVE DUE PROCESS

Because the City Council's granting of the Appeal was arbitrary, it violated the Clarks' Substantive Due Process rights. (Sierra Lake Reserve v. City of Rocklin (9th Cir. 1991) 938 F.2d 951, 958.) "This sort of arbitrary administration of the local regulations, which singles out one individual to be

treated discriminatorily, amounts to a violation of that individual's substantive due process rights." (Bateson v. Geisse (9th Cir. 1988) 857 F.2d 1300, 1303. Such discrimination was present here.

The finding of an abuse of discretion made by the Court with respect to the writ of mandate cause of action also serves to support the substantive Due Process claim as well. As set forth in Subsection (b) of Code of Civil Procedure § 1094.5:

> Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.

Here, in its previous ruling on the writ of mandate cause of action, the Court specifically found that the City Council's findings were not supported by substantial evidence. This finding is based upon the Administrative Record.

Also, the City's action in rejecting the Clarks' Project constituted an instance of illegal "spot zoning," in violation of the Clarks' substantive due process rights. Municipalities may not discriminate against a parcel of land through zoning regulations. (Ross v. City of Yorba Linda (1991) 1 Cal.App.4th 954, 964-968.) "Spot zoning" is defined as arbitrarily restricting and giving lesser development rights to a parcel than the surrounding properties. (Ross, supra, (1991) 1 Cal.App.4th at 960.)

Here, the evidence indicates the Clarks' property is located in the middle of a several block stretch of properties zoned and developed to R-3 standards. For approximately ten years before the City's denial of the Clarks' Project, all new or recycled development in the neighborhood surrounding the Clarks' property had been built to the maximum height permitted by the City code. The Staff Report to the Planning Commission stated that the "the proposed project would not be inconsistent with the area."

Additionally, the City Council majority's attempt to impose the terms of the failed moratorium on the Clarks' Project on an ad hoc basis is also arbitrary and constitutionally defective. (See, e.g., Silvera v. City of South Lake Tahoe (1970) 3 Cal.App.3d 554, 558.)

Additionally, the fact that the City had previously granted permits for a virtually identical project on the same location, while not determinative, is evidence that there was no valid reason for denying the Project. (See, e.g. Arnel Development Co. v. City of Costa Mesa (1981) 126 Cal.App.3d 330, 337.) In approving the 1989 project, the City found "the site is ... physically suited for the proposed development," and the development would be "compatible with adjacent residential properties... ." In short, the Court finds the granting of the appeal was arbitrary and discriminatory, in violation of the Clarks' substantive due process rights.

II. With regard to the Issue of Damages, the Court's decision is that the Clarks have been damaged in the amount of $213,300.00.

A. The Court based its decision on, among others, the following facts:

The Clarks, due to the unlawful denial of their Project, have been affected by a dramatic drop in real estate prices that have reduced the market value of their Project as well as an increase in development costs. This has damaged the Clarks in that their intention was to sell the rear condominium unit in order to finance the Project. The Clarks' appraiser and his method of valuation, appeared more credible than the City's appraiser and his approach to valuation, including his assumptions.

The Court finds the loss in property value of the rear unit occasioned by the delay caused by the City's wrongful denial of the Clarks' Project is $100,000.00.

With respect to the increased development costs and additional carrying costs caused by the delay that resulted from the City's wrongful denial of the Clarks' Project, the Court finds the Clarks were damaged in the amount of $93,300. The vast majority of these increased costs ($89,000) relate to construction costs. The City presented no evidence to rebut these increased costs.

The Court determines that an appropriate amount to compensate the Clarks for their emotional distress is $20,000.00. The Court finds the evidence preponderates in favor of a determination that the City's arbitrary and cavalier treatment of the Clarks' project caused them unnecessary distress, emotional upset, and acute anxiety over a period of over two and one half years. Their lives were disrupted and their plans delayed and threatened for no valid reason.

The total of the damages for loss in property value, the increased development costs and additional carrying costs, and emotional distress is the $213,300.00.

B. The legal basis for the Court's decision is the provisions for damages Code of Civil Procedure Section 1095 and 42 U.S.C. Section 1983. Emotional distress damages are a proper component of damages for a violation of civil rights under 42 U.S.C. Section 1983. (Memphis Community School Dist. v. Stachura (1986) 477 U.S. 299, 306-307, 91 L.Ed.2d 249, 258, 106 S.Ct 2537.)

III With regard to the issue of attorneys' fees and other litigation costs, such as expert witness fees, the Court's decision is that the Clarks are entitled to recover said expenses. The basis of the recovery is 42 U.S.C. Section 1988, Code of Civil Procedure Section 1021.5, and Government Code Sections 800 and 91012. The amount of said award shall be

established in conjunction with the proceedings on the cost bill.

DATED: 11-14-94

s//Judge Jean E. Matusinka//
Jean E. Matusinka,
Judge of the Superior Court

Appendix D-1

Filed 11/13/96

Second Appellate District, Division One, No. B089504
S056307

IN THE SUPREME COURT OF CALIFORNIA

DOUGLAS A. CLARK Et Al., Respondents

v.

CITY OF HERMOSA BEACH Et Al., Appellants

Respondents' petition for review DENIED.

The requests for depublication and full publication of the opinion are denied.

George
Chief Justice

No. 96-1278

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In The

Supreme Court of the United States

October Term, 1996

DOUGLAS A. CLARK AND CHERYL CLARK,

Petitioners,

v.

CITY OF HERMOSA BEACH, THE CITY COUNCIL OF THE CITY OF HERMOSA BEACH,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of The State Of California Second Appellate District

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Do petitioners have a federally protected property interest in their desire to demolish the existing and economically viable duplex on their property and replace it with condominiums when they have no entitlement to do so under California law or the Hermosa Beach Municipal Code?

2. If petitioners have no federally protected property interest in their desire to replace their duplex with condominiums, does a denial of the fair hearing required by state law on their permit application constitute a violation of federal procedural due process?

3. Can petitioners state a federal procedural due process claim based on the denial of a fair hearing when California law provides an adequate remedy and the court below has already ordered the City to give petitioners a new hearing?

4. Was the denial of petitioners' application on grounds that their planned condominiums are not compatible with surrounding uses and exceed the permitted lot coverage, arbitrary, irrational and a violation of federal substantive due process when the City's zoning requires denial under those circumstances?

5. Did the actions of the City Council in permitting a councilmember later held to be biased, and in first considering a legal issue after the close of the public hearing, constitute arbitrary, irrational conduct and a violation of federal substantive due process when the City Council requested and acted upon the advice of counsel before taking those actions?

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, the City of Hermosa Beach and the City Council of the City of Hermosa Beach (the "City"), respectfully request that this Court deny the petition for writ of certiorari seeking review of the opinion (App.A) of the California Court of Appeal, Second Appellate District, which is published at 48 Cal.App.4th 1152 (1996).

STATEMENT OF THE CASE

This case is a garden variety zoning dispute concerning how high petitioners may build and how much of their property can be covered with a structure. It does not, as petitioners would have the Court believe, involve deprivation of the right to reasonable use of land and does not present any important issue justifying review by this Court.

The property which petitioners Douglas and Cheryl Clark (the "Clarks") own in the City of Hermosa Beach (the "City"), California, is located close to the beach in a multiple residential zone (R-3) and was already improved with a duplex when petitioners purchased it. (JA I, tab 19:223)[1] Petitioners rent one unit of the duplex to a tenant and keep the other for themselves for use on weekends and during vacations when they can come to California from their home in Arizona. (JA I, tab 19:168, 252, 275)

[1] References to "JA" are to the Joint Appendix filed by the parties in the California Court of Appeal, which contains the Administrative Record of the City's proceedings on the Clarks' application and the record of the proceedings in the trial court.

Petitioners now wish to demolish the duplex and build larger condominiums in its place. It is undisputed that the City will allow them do so if they will comply with City's standards concerning neighborhood compatibility (height) and lot coverage. Thus, the opinion below explains:

> "The City did not bar the Clarks from building the condominium project altogether; it denied their application without prejudice to submitting a revised plan reflecting the Council's concerns about height, lot coverage and usable open space. Thus, the *interest at issue* is not that of a landowner to construct a roof over his head; rather, it *is the Clarks' interest in building a structure having the specific dimensions they find desirable.*" (App.A 36)

The City's Municipal Code requires both a conditional use permit (§§ 7.2.4 & 1404, R.App. 8 & 10) and a precise development plan permit (§§ 1430-1432, R.App. 11-12) before condominiums can be built. The purpose of these permits is to give the City the discretion to (1) impose conditions to assure compatibility with existing and potential uses within the general area in which a proposed use is to be located; (2) impose conditions mitigating any adverse environmental impacts; and (3) deny permits for incompatible projects. (§ 1404, R.App. 10; § 1432, R.App. 11-12; §§ 1430-1432) California law authorizes cities to require discretionary permits for these purposes. *Harris v. County of Costa Mesa*, 21 Cal.App.4th 663, 971-72 (1994); *Desmond v. County of Contra Costa*, 21 Cal.App.4th 330, 337 (1993); *Dore v. County of Ventura*, 23 Cal.App.4th 320, 329 (1994).

The City's Municipal Code also establishes certain minimum requirements applicable to the R-3 zone. In this case the most relevant minimum standards are the 35 foot maximum height limit (§ 601, R.App. 8) and the 65% maximum lot coverage limit (2.29-1 §§ 606 & 607, R.App. 6-9). As the opinion below explains, these minimum requirements do not create any entitlement to build a condominium that is 35 feet tall or which covers 65% of the lot. Rather, the conditional use process and precise plan process both give the City the right to impose stricter standards (*e.g.*, less lot coverage, more open space and a lower height) to ensure compatibility with the neighborhood. (App.A 37-38; see § 1432(A), R.App. 11-12)

In this case, the City Council denied the permits because the 35-foot height of the proposed condominiums was incompatible with the neighborhood and petitioners' proposed condominiums exceeded the maximum 65% permitted lot coverage. (JA II, tab 20:440-441) However, the denial was without prejudice. This meant that the Clarks could submit a revised application meeting the City's concerns about the height and lot coverage of the condominiums without paying a new fee and without starting the process all over again. (JA II, tab 19:303; tab 20:441)

The evidence before the City at the duly noticed, public hearing on the Clarks' application showed that their property is a corner lot and is adjacent to R-1 and R-2 uses with heights of 25 and 30 feet (JA I, tab 19:212-219); many of the adjacent uses in the R-3 zone are also 30 feet or less in height, the residence immediately to the east of their property is between 25 and 30 feet in height; and 75% of the buildings in the neighborhood are

30 feet or less in height. (JA I, tab 19:162-163; 220-222; 240; 281-283; 297-299) The evidence also showed that the proposed condominiums exceeded the maximum permitted lot coverage under Municipal Code § 229.1. (JA I, tab 19:288-291)

The opinion below explains that the City's concern with the height of the condominiums and lot coverage were legitimate and that the City's decision could not be considered arbitrary or irrational. (App.A 43-44) However, it held that the Clarks were denied the fair hearing required by California law because a councilmember who participated was biased and the Clarks were not given an adequate opportunity to respond to the City Council's interpretation of the lot coverage provision.[2] The remedy for that injury provided by California law (Cal.Code Civ.Pro. § 1094.5(f), R.App. 6), and ordered by the court below, is to remand the Clarks' application to the City for a new hearing without the participation of the councilmember found to be biased. (App.A 24-30 & 49-50)

---

[2] While the City did not appeal the fair hearing ruling, the City strongly disputes the pejorative mischaracterizations of the "facts" alleged in the petition. Since the fair hearing issue has already been decided, the rather lengthy portion of the petition which accuses the City of denying the Clarks a fair hearing is irrelevant to the issues presented in the petition. Indeed, some of the so-called "facts" set forth in the petition involve events long before the subject permit application was filed in an attempt to create the erroneous impression that the City has long given the Clarks a bad time. In fact, the City granted the Clarks' two prior permit applications, but the Clarks allowed them to lapse without ever obtaining building permits. Those applications were not, as the petition implies, identical to the subject application.

The petition for certiorari seeks review of the portion of the opinion below which denies petitioners damages and attorneys' fees under § 1983. However, it does not challenge the portions of the opinion which hold that: (1) there is no entitlement to the permits under California law (App.A 35-38); (2) the California courts cannot compel the issuance of permits in the absence of such an entitlement (App.A 24-26); and (3) the remedy provided by California law is to order a new hearing in light of the court's opinion (App.A 24-25).

Further, the petition does not challenge the ruling of the court below (App.A 41 & 43-44) that the City did *not* act in an arbitrary or irrational manner in denying the permits. In fact, the petition ignores that holding entirely and claims, mistakenly, that the court below applied an improper "shocks the conscience" standard in evaluating their substantive due process claim. However, the opinion expressly holds that the Clarks do not have a substantive due process claim because they have no protected property interest and, alternatively, that if they have a protected property interest, there is no substantive due process violation because neither the City's decision nor its conduct was arbitrary and irrational. (App.A 41 & 44) That holding is clearly correct.

As the petition concedes, arbitrary and irrational conduct is required to establish a substantive due process violation. (Pet. at 22 and the cases cited there) Since the petition does not challenge the ruling below that there was no arbitrary and irrational conduct, there is no basis whatever for a substantive due process claim.

Thus, the only questions properly raised by the petition are (1) whether the denial of the fair hearing required by California law on the Clarks' application for permits to which they have no entitlement can be the basis for a federal procedural due process claim; and (2) whether the remedy for the denial of a fair hearing provided by California law precludes a federal procedural due process claim in this case. The court below correctly answered these questions based on well-settled law established by this Court and uniformly followed by the federal circuits. The Clarks have no federal procedural due process claim because they have no protected property interest in the discretionary permits they seek and California law has already provided an adequate remedy.

REASONS FOR DENYING THE PETITION

A. THERE IS NO FINAL JUDGMENT IN THIS CASE

Before the jurisdiction of this Court can be invoked by petition for certiorari review, the petition must show that the decision of the state court which it seeks to have reviewed is final. 28 U.S.C. § 1257.

The court below reversed the judgment of the trial court and remanded this case to the trial court with instructions for further proceedings. The trial court has already issued a new writ of mandate directing the City to hold a new hearing without the participation of the biased councilmember. (R.App. 1-2) Under California law the trial court retains jurisdiction after the issuance of a writ so that it can enforce the writ and determine whether the new hearing held by the City satisfies the mandate of

court of appeal and complies with all applicable law. (Cal.Code Civ.Pro. § 1097; R.App. 7) If the Clarks believe the City's decision at the new hearing is erroneous, they may challenge it in the trial court. However, all trial court proceedings and City administrative proceedings have been stayed pending the resolution of the petition in this Court (R.App. 5) and there is no final judgment in this case.

Although the Clarks have already been granted a new hearing, they claim federal due process violations so that they can also recover damages under 42 U.S.C. § 1983. Their claimed damages are based on alleged increases in the cost of constructing their proposed condominiums and loss of hoped-for profit from the sale of the condominiums. (App.C 17-18) These claims assume the permits needed to demolish their duplex and replace it with condominiums will be granted.

However, it is not known at this time whether or not the permits will be granted to the Clarks. If the permits are denied based on substantial evidence at a fair hearing, there would be no basis for awarding compensatory damages based on the increased costs of construction and lost profits. Thus, the claim for damages under 42 U.S.C. § 1983 which they seek to vindicate in this Court is premature.

B. THE PETITION SEEKS TO RAISE A CLAIM THAT WAS NOT RAISED BELOW

As *Yee v. City of Escondido*, 503 U.S. 519, 533, 118 L.Ed.2d 153, 169, 112 S.Ct. 1522 (1992), citing *Illinois v.*

Gates, 462 U.S. 123, 218-220, 76 L.Ed.2d 527, 536, 103 S.Ct. 2317 (1983), explains:

> "In reviewing the judgments of state courts under the jurisdictional grant of 28 U.S.C. § 1257, the Court has, with very rare exceptions, refused to consider petitioners' claims that were not raised or addressed below."

As *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 77-78, 100 L.Ed.2d 62, 72, 108 S.Ct. 1645 (1988), further explains:

> " '[a]t the minimum . . . there should be no doubt from the record that a claim under a federal statute or the Federal Constitution was presented in the state courts *and that those courts were apprised of the nature or substance of the federal claim*, at the time and in the manner required by the state law."

The petition claims that the court below erred in not recognizing that the Clarks' interest in their property gives them a federally protected property interest. (Pet. 15-19) However, that is not the claim they put before the trial court. It is not the claim they raised in their respondents' brief in the court below or in their petition for rehearing in that court. Nor did they raise this claim in their petition for review in the California Supreme Court.

Instead, the Clarks claimed in those courts that they had an entitlement to, and a federally protected property interest in, the permits needed to demolish their duplex and replace it with condominiums. They argued that this interest arose from the extensive procedural requirements

for granting and denying the permits established by California law and the City Municipal Code and claimed those requirements deprived the City of discretion.

The trial court erroneously accepted this claim. (App.A 39, fn. 32, App.C 9-10) However, the court below correctly rejected it, and reversed the trial court, because it is established California law that there is no entitlement to discretionary permits, such as the conditional use permit and precise plan permit at issue in this case. (App.A 38-40) However, the claim made by petitioners in this Court was never presented or addressed in the California courts.

The "consideration of comity to the States," which underlies the "not pressed or passed upon" rule, should, therefore, preclude certiorari review in this case. *Bankers Life & Casualty Co.*, 486 U.S. at 79, 100 L.Ed.2d at 73.

C. THE PETITION MISLEADS THIS COURT BY CLAIMING THAT THE COURT BELOW APPLIED A "SHOCKS THE CONSCIENCE" TEST TO REJECT PETITIONERS' SUBSTANTIVE DUE PROCESS CLAIM; IT REJECTED THAT CLAIM BECAUSE THE CITY DID *NOT* ACT IN AN ARBITRARY OR IRRATIONAL MANNER

The petition asserts that the opinion below erroneously applied a "shocks the conscience" standard in determining whether the conduct and decision of the City constituted a violation of substantive due process. That claim is contrary to the express holding of the court below that the substantive due process claim fails

because the City's conduct was neither arbitrary nor irrational. (App.A 41)

Thus, while the opinion below (App.A 40-41) notes that some courts have limited the application of substantive due process in land use cases, have limited its application to "liberties deeply rooted in this Nation's history and tradition" and have applied a "shocks the conscience" standard, the opinion holds that:

> "As indicated in our discussion of the Clarks' procedural due process claim, they have no protected property interest in the requested permits. (See pt.II.A, *ante*) Accordingly, the substantive due process claim fails for that reason alone. Alternatively, even if a constitutionally recognized property interest is involved, *we find that the City did not engage in arbitrary or irrational conduct.*" (App.A 41, emphasis added)

The opinion further explains that the City's conduct cannot be considered irrational because:

> "Although we have concluded that Councilmember Benz had a conflict of interest in voting on the project, the city attorney advised the Council at the public hearing that there was no conflict. That advice was incorrect, but it was not irrational. In light of the city attorneys' opinion the Council did not act irrationally by allowing Benz to participate in the proceedings.[3]

---

[3] As noted in footnote 33 (App.A43), many of the factual claims advanced at the trial and relied on by the trial court and court below in finding Benz to be biased were never presented to the City Council or the city attorney during the hearing even though they were known to the Clarks at the time of the hearing.

> "Plainly, the Council erred in considering and deciding issues raised for the first time after the public hearing was over. Further, it *may have* misconstrued or misapplied the provisions of the zoning ordinance concerning lot coverage and usable open space. Nonetheless, the Council's ultimate decision to deny the permits did not lack a rational basis."[4] (App.A 43, emphasis in the original)

The opinion also explained that the City's concern about the 35-foot height of the Clarks' condominiums was rational in light of the "evidence that most of the homes in the area were 30 feet in height or lower" and the testimony of neighbors who considered the height of Clarks' project to be inconsistent with the neighborhood. (App.A 43-44)

Thus, contrary to the claims in the petition, the test applied by the court below was whether the City engaged in arbitrary and irrational conduct. That is the very test advocated by the Clarks and applied by the federal circuit court opinions on which they rely in the petition. (Pet. at 22)

Thus, there is no basis for the claim that the court below applied an improper "shocks the conscience" test to the Clarks' substantive due process claim.

---

[4] Because of its ruling on the fair hearing issue, the court below did not decide whether the City's decision was supported by substantial evidence or determine the proper legal interpretation of the lot coverage provision.

D. THE PETITION MISLEADS THIS COURT BY CLAIMING THAT THERE IS A SPLIT OF AUTHORITY AMONG THE FEDERAL CIRCUITS CONCERNING THE DUE PROCESS ISSUES PRESENTED BY THIS CASE

The petition correctly acknowledges that, like the California Court of Appeal opinion below, the Second, Fourth, Sixth, Ninth and Eleventh Circuits require an entitlement to a permit before a federal procedural due process violation can arise from the denial of the permit. (Pet. at 13) The First, Eighth, and Tenth Circuits follow the same rule. *See Creative Environments, Inc. v. Easterbrook*, 680 F.2d 822, 831, 832-833 (1st Cir. 1982); *Chesterfield Dev. v. City of Chesterfield*, 963 F.2d 1102, 1104-1105 (8th Cir. 1992); *Jacobs, Visconsi & Jacobs v. City of Lawrence*, 927 F.2d 1111, 1116 (10th Cir. 1991).

In an attempt to manufacture grounds for certiorari review, the petition claims that the Seventh and Third Circuits have reached contrary results, and have found federal due process violations and liability under 42 U.S.C. § 1983 based on the denial of discretionary permits like those at issue in this case. That claim is erroneous.

While the Seventh Circuit opinion in *River Park, Inc. v. City of Highland Park*, 23 F.3d 164 (7th Cir.1994), does contain the language cited by the Clarks about the importance of rights in the ownership of land, it assumed that River Park had an entitlement to, and protected property interest in, the rezoning it sought. *Id.*, 23 F.3d at 165. Thus, it did not address discretionary permits such as those involved in this case.

Further, even though River Park had a protected property interest and the city in that case had improperly employed procedural maneuvers to keep River Park's application from being acted upon, the Seventh Circuit held that no federal due process claim had been stated because:

> "The Constitution does not require state and local governments to adhere to their procedural promises. (citations) Failure to implement state law violates that state law, not the Constitution, the remedy lies in state court." 23 F.3d at 166-167.

The Third Circuit decision cited in the petition also fails to support the claim that there is a conflict among the circuits. Thus, in *DeBlasio v. Zoning Board of Adjustment*, 53 F.3d 592 (3rd Cir. 1955), the plaintiff's property had been used as an auto body shop, which became a legal non-conforming use when the zoning was changed. The local zoning provided that the use could continue so long as it was not expanded or abandoned. *Id.*, at 594. The plaintiff therefore had an entitlement to continue the use. By contrast the Clarks have no entitlement to demolish their existing duplex and replace it with condominiums.

Further, the plaintiff in *DeBlasio* was appealing from a summary judgment rejecting all his claims. The Third Circuit affirmed the rejection of his procedural due process claim. It held that the procedural due process claim was barred by the adequate state court remedy available to DeBlasio. *Id.*, at 596-597. The Clarks' procedural due process claim in this case would fail for the same reason even *if* they had an entitlement similar to DeBlasio's.

The Third Circuit reversed the dismissal of DeBlasio's substantive due process claim because he alleged, and had advanced evidence to support the allegation, that the Board had acted in an arbitrary and irrational manner in finding that he was in violation of the zoning because of illegal expansion of the use. *Id.*, at 601. Thus, *DeBlasio* held that material issues of fact remained to bar summary judgment. *Id.*, at 601. In this case, there has been a trial and the court below expressly found that the City's conduct was *not* arbitrary and irrational.

There is no split of authority among the circuits concerning the issues in this case. The petition does not cite a single case finding a federal procedural due process violation based on the denial of discretionary land use permits.

E. THIS CASE DOES NOT RAISE ANY ISSUE CONCERNING THE RIGHT TO REASONABLE USE OF LAND OR ANY ISSUE WHICH REQUIRES THIS COURT TO CLARIFY THE RIGHTS OF LANDOWNERS IN THEIR PROPERTY

The petition claims that guidance is needed from this Court concerning whether landowners seeking permits have a protected property interest in their land. However, the law is already clear that landowners have protected interests in the ownership of land. They have the right to reasonable use of land, to economically viable use of land, to exclude others from their land, to sell their land, to freedom from restrictions on the use of land which are arbitrary and irrational or deny them equal protection of

the law and the right to compensation if their land is taken for a public purpose. However, none of those rights are at issue in this case.

The Clarks have reasonable and economically viable use of their land as a duplex. That is the use which existed on their property when they purchased it. They may also change that use to other multiple residential uses which comply with the City's Municipal Code. It is undisputed that they may build condominiums on their property, albeit smaller and less tall than they would prefer.

There has been no interference with the Clarks' right to exclude others from their property or to sell their property. They are in possession of their property and there has been no attempt to take their property. There is no contention in this case that the provisions of the Municipal Code impose unconstitutional restrictions on their right to use their property. Further, the Municipal Code required the same conditional use permit and precise plan permit when they purchased the property as it does now. Thus, there is no credible basis for claiming that this case involves a threat to the rights inherent in owning land.

In an attempt to conjure up an issue which is related to this case and justifies review by this Court, the petition cites cases concerning property rights which arise in a variety of disparate contexts without ever identifying the context for the Court. Thus, they cite cases involving substantive and procedural due process, and facial and as applied, attacks on land use decisions without acknowledging the differing legal analyses required for each of

those claims and without explaining how those cases apply to the facts of this case. For example, petitioners cite *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 71 L.Ed. 303, 474 S.Ct. 114 (1926), to claim that the interest the courts should look to in determining whether there is a protected property interest is ownership of land rather than the permit sought. However, *Village of Euclid* involved a facial attack on a zoning ordinance and applied a *substantive* due process analysis in determining its constitutionality. It has no application to the Clarks' claim that they were denied *procedural* due process because they did not receive the fair hearing required by California law on their permit applications.

There is no ambiguity in the legal principles applicable to this case. It is a run of the mill zoning dispute and the court below correctly determined that the Clarks have no federal procedural due process claim because they have no protected property interest in the permits they seek and no substantive due process claim because the City did not act arbitrarily or irrationally in denying the permits.

F. THE OPINION BELOW IS CLEARLY CORRECT

1. There Is No Basis For Finding A Violation Of Federal Procedural Due Process In This Case Because No Federally Protected Property Interest Is Involved

This Court explained in *Board of Regents v. Roth*, 408 U.S. 564, 33 L.Ed.2d 548, 92 S.Ct. 2701 (1972) that:

> "The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." *Id.*, 408 U.S. at 569-570, 33 L.Ed.2d at 556.

No liberty interest is involved in this case and the question presented is whether the Clarks have a protected property interest in the discretionary permits they seek. As *Roth* explains, to have a protected property interest:

> "[A] person clearly must have more than abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead have a legitimate claim of entitlement to it." *Id.*, 408 U.S. at 577, 33 L.Ed.2d at 561.

As *Roth* further explains:

> "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . " *Id.*

It is undisputed that under California law there is no entitlement to the discretionary permits sought by the Clarks in this case. Thus, under *Roth*, and the legion of state and federal circuit court opinions following it, there is no basis for finding a violation of federal due process in this case because it does not involve a protected property interest.

While the petition argues that *Roth* should not apply when ownership of land is involved, there is no reason

why the Clarks' desire to replace their duplex with condominiums is any more important, or should be treated any differently, than the desire for continued employment at issue in *Roth*. As discussed in Part D above, not even the cases cited in the petition to claim that *Roth* should not apply in the land use cases have held that a plaintiff can state a federal procedural due process claim when discretionary land use permits have been denied.

If the Court were to accept petitioners' argument that the mere fact of land ownership automatically creates a federally protected interest whenever a land use permit is sought, there is hardly a land use decision made by local jurisdictions that would not be subject to challenge in the federal courts. Anyone who wished to construct a building taller than permitted or closer to his neighbor than permitted by a local zoning body could challenge the decision in federal court under 42 U.S.C. § 1983 on the ground that the decision was arbitrary or that a fair hearing was not provided. The federal courts would be inundated with cases in which they must act as zoning appeal boards and local control of planning and zoning would be eviscerated.

2. There Is No Basis For A Federal Procedural Due Process Claim In This Case Because State Law Provides An Adequate Remedy

Even when a federally protected interest is established, the remedy for procedural errors in making local land use decisions, such as denial of a fair hearing, generally lies in state court. Thus, in *DeBlasio, supra*, 53 F.3d 592, which is relied on in the petition, the plaintiff had a

protected property interest in continuing his existing non-conforming use and he alleged that the zoning board had acted in an arbitrary and irrational manner in finding him in violation of the zoning ordinance. Nonetheless, the opinion in *DeBlasio* explains that:

> "In order to establish a violation of his right to procedural due process, DeBlasio in addition to proving a person acting under color of state law deprived him of a protected property interest, must establish that the state procedure for challenging the deprivation does not satisfy the requirements of procedural due process. (citation) . . . a state provides constitutionally adequate procedural due process when it provides reasonable remedies to rectify a legal error by a local administrative body." *Id.*, 53 F.3d at 592.

In *River Park, supra,* also relied on in the petition, the court assumed that River Park had an entitlement to the permits it sought and found that the city had improperly employed a series of procedural maneuvers to prevent a decision on River Park's proposal. It nonetheless held that River Park had no federal claim even though River Park got less due process than required by Illinois law:

> "the Constitution does not require state and local governments to adhere to their procedural promises. (citations) Failure to implement state law violates that state law, not the Constitution; the remedy lies in state court." *Id.*, 23 F.3d at 166-167.

In this case, California law and the Municipal Code require notice and a meaningful opportunity to be heard. The City held a noticed, public hearing on the Clarks' application and denied the permits on the grounds that

the height of their proposed condominiums were incompatible with the neighborhood and exceeded the lot coverage permitted by the Municipal Code. California law provides an adequate remedy for challenging such decisions. Thus, California Code of Civil Procedure § 1094.5 provides that a peremptory writ of mandate setting aside the decision and, when appropriate, remanding it to the local agency for further proceedings in light of the court's opinion,[5] shall issue if: (1) the decision is not supported by substantial evidence; (2) a fair hearing was not provided; or (3) the local agency failed to proceed in the manner required by law. (R.App. 6)

This is clearly an adequate remedy and the Clarks did in fact obtain relief under Code of Civil Procedure § 1094.5. The court below held that they did not receive a fair hearing and ordered the City to provide a new hearing without the participation of the councilmember it found to be biased. Under *DeBlasio* and *River Park*, the existence of that remedy precludes a federal procedural due process claim.

Further, a federal procedural due process claim does not lie when an adequate post deprivation remedy, such as that provided by California Code of Civil Procedure § 1094.5, is available and the State cannot provide a predeprivation process that could have prevented the

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[5] In some cases setting aside a decision or regulation is a sufficient remedy and there is no need for a remand. In some cases, the respondent agency may choose to adopt a revised regulation or take no action. However, when an erroneous decision has been made on a discretionary application, a new hearing is required to protect the petitioner/applicant.

deprivation. *Parratt v. Taylor*, 451 U.S. 527, 68 L.Ed.2d 420, 101 S.Ct. 1908 (1981) and *Zinermon v. Burch*, 494 U.S. 113, 108 L.Ed.2d 100, 110 S.Ct. 975 (1990). *Zinermon* explains that this rule is limited to situations involving "random and unauthorized conduct" because it is not possible to provide a predeprivation process that would prevent a random or unauthorized deprivation.

Thus, in *Parratt* a post deprivation remedy was adequate and barred a federal procedural due process claim because:

> "It would do no good for the State to have a rule telling its employees not to lose mail by mistake, and it 'borders on the absurd to suggest that a State must provide a hearing to determine whether or not a corrections officer should engage in negligent conduct.' " *Zinermon*, 494 U.S. at 136-137, 108 L.Ed.2d at 121.

Similarly, the existence of a post deprivation remedy barred a federal procedural due process claim in *Hudson v. Palmer*, 468 U.S. 517, 82 L.Ed.2d 393, 104 S.Ct. 3194 (1984), because there was no way the State could provide a predeprivation process that could have prevented the intentional destruction of a prisoner's property which resulted from the personal animosity of a prison guard toward that particular prisoner:

> "The errant employee himself could anticipate the deprivations since he intended to effect it, but the State still was not in a position to provide predeprivation process, since it could not anticipate or control such random and unauthorized intention conduct. (cites) Again, a rule forbidding a provision guard to maliciously destroy a prisoner's property would not have

> done any good; it would be absurd to suggest that the State hold a hearing to determine whether a guard should engage in such conduct." *Zinermon*, 494 U.S. at 137, 108 L.Ed.2d at 121.

In this case, the crux of the Clarks' claim is that they did not get a fair hearing before their applications were denied because a biased councilmember participated in the hearing and an issue concerning the interpretation of the lot coverage provision of the Municipal Code was first raised after the close of the hearing. Although California requires a fair hearing before acting on applications for permits like those at issue in this case, there is no way that California could anticipate or control such mistaken and unauthorized conduct. In this regard, neither the City Council nor the city attorney were even aware of most of the facts on which the court below based its ruling that the Clarks were denied a fair hearing. (App.A 43, fn.33)

Under these circumstances, a federal procedural due process claim does not lie because California provides an adequate remedy. *Zinermon; Parratt, supra.* The Clarks have already obtained relief under that remedy.

3. There Was No Arbitrary Or Irrational Conduct In This Case Which Could Provide The Basis For A Substantive Due Process Claim

As the petition acknowledges, arbitrary and irrational conduct is required to establish a violation of substantive due process. (Pet. at 22 and the cases cited there)

However, the opinion below expressly held that the conduct of the City in denying their permit applications was *not* arbitrary and irrational. (App.A 41, 43-44, see quotations from the opinion in Part C above) The petition does not dispute that ruling. Thus, there is no basis on which to find a substantive due process violation.

Further, no important issue justifying review by this Court would arise even if petitioners disputed that ruling. Such a claim would, in essence, require this Court to review the decision of the court below for factual error. That is not an appropriate basis for review by this Court and would not present an issue of concern to anyone but the parties to this case.

CONCLUSION

The City respectfully requests that this Court deny the Clarks' petition for writ of certiorari because there is no final judgment in this case, it raises an issue not raised below, it presents no issue appropriate for this Court's review and the holdings of the court below were not in error.

DATED: March 11, 1997

Respectfully submitted,

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NO LEGAL FILE DEPT.SW B

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

Date: December 10, 1996

Honorable JEAN E. MATUSINKA, Judge	)	DEBORAH LUNA, Deputy Clerk
KEN DOOL, Deputy Sheriff, Court Attendant	)	NONE, Reporter, E/R Monitor

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YS002665 (Parties and Counsel checked if present)

CLARK, DOUGLAS A	Counsel For N/P Plaintiff
CITY OF HERMOSA BEACH	Counsel For N/P Defendant

NATURE OF PROCEEDINGS: RETURN ON REMITTITUR

Pursuant to the Appellate Court's decision, the court issues a Writ of Administrative Mandate commanding the Hermosa Beach City Council to set aside its decision overturning the planning commission's approval of the Clark's project; to rehear the appeal from the planning commission's decision and to provide the Clarks' with a fair hearing on the matter.

The court orders Plaintiffs' to resubmit their cost bill in compliance with the Appellate Court's decision, and CCP Section 1033.5.

A copy of this minute order is sent via U.S. mail this date to the parties below:

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Minutes Entered: December 10, 1996

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ORIGINAL FILED
DECEMBER 27, 1996
LOS ANGELES
SUPERIOR COURT

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

DOUGLAS A. CLARK and CHERYL CLARK, Plaintiffs/Petitioners, vs. CITY OF HERMOSA BEACH, THE CITY COUNCIL OF THE CITY OF HERMOSA BEACH, and DOES 1 through 25, inclusive, Defendants/Respondents.	Case No. YS002665 ASSIGNED FOR ALL PURPOSES TO: JUDGE JEAN E. MATUSINKA DEPARTMENT B STIPULATION TO STAY PROCEEDINGS PENDING UNITED STATES SUPREME COURT ACTION ON PETITION FOR CERTIORARI; [PROPOSED] ORDER Complaint Filed: 07/17/92

THIS STIPULATION IS ENTERED INTO between Plaintiffs/Petitioners DOUGLAS A. CLARK and

CHERYL CLARK (collectively "the Clarks") on the one hand and Defendants/Respondents THE CITY OF HERMOSA BEACH and THE CITY COUNCIL OF THE CITY OF HERMOSA BEACH (collectively "Defendants") on the other hand, through their respective counsel.

WHEREAS the Court of Appeal's decision in this matter was issued and the matter has been remanded with direction;

AND WHEREAS the Clarks intend to file a Petition for Certiorari to the United States Supreme Court and anticipate doing so in early February of 1997;

AND WHEREAS the parties wish to stay any proceedings at the trial court and any administrative actions by the City pending determination by the United States Supreme Court of the Clarks' Petition for Certiorari;

NOW THEREFORE it is stipulated by and between the parties that all proceedings before the trial court and all administrative proceedings before the City or City Council should be stayed pending determination by the United States Supreme Court of the Clarks' Petition for Certiorari.

DATED: December 20, 1996

RUTAN & TUCKER
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M. KATHERINE JENSON

By s/Katherine Jenson
M. Katherine Jenson
Attorneys for Plaintiffs/
Petitioners
DOUGLAS A. CLARK
and CHERYL CLARK

DATED: December 26, 1996

RICHARDS, WATSON &
GERSHON ROCHELLE BROWNE

By s/Rochelle Browne
Rochelle Browne
Attorneys for Defendants/
Respondents THE CITY
OF HERMOSA BEACH

ORDER

All proceedings in the within action, including any administrative proceedings, are stayed pending determination by the United States Supreme Court of the Petition for Certiorari to be filed by the Clarks.

DATE: December 27, 1996

s/Jean E. Matusinka
Jean E. Matusinka, Judge of the
Superior Court

EXCERPTS FROM THE CALIFORNIA CODE OF CIVIL PROCEDURE

CHAPTER 2

Writ of Mandate

Sec. 1094.5. Inquiry into validity of administrative order or decision.

(a) Where the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer, the case shall be heard by the court sitting without a jury. . . .

(b) The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.

(f) The court shall enter judgment either commanding respondent to set aside the order or decision, or denying the writ. Where the judgment commands that the order or decision be set aside, it may order the reconsideration of the case in the light of the court's opinion and judgment and may order respondent to take such further action as is specially enjoined upon it by law, but the judgment shall not limit or control in any way the discretion legally vested in the respondent.

Sec. 1097. Penalty for disobedience to writ. When a peremptory mandate has been issued and directed to any inferior tribunal, corporation, board, or person, if it appear to the court that any member of such tribunal, corporation, or board, or such person upon whom the writ has been personally served, has, without just excuse, refused or neglected to obey the same, the court may, upon motion, impose a fine not exceeding one thousand dollars. In case of persistence in a refusal of obedience, the court may order the party to be imprisoned until the writ is obeyed, and may make any orders necessary and proper for the complete enforcement of the writ.

EXCERPTS FROM THE HERMOSA BEACH MUNICIPAL CODE

R-3 ZONE MINIMUM STANDARDS

Sec. 7.2-4. Conditional use permit required.

All condominiums, community apartments and stock cooperatives shall be subject to approval of a conditional use permit by the planning commission.

Sec. 7.2-6. Minimum design standards.

(c) *Height:* In addition to height restrictions found within the various zones, along walk streets the maximum height in the front half of the lot shall be twenty-five (25) feet. The walk street shall be considered the front of the lot, except on reversed corner lots, where the side yard adjacent to the walk street shall be considered the front.

Sec. 229.1. Lot coverage.

"Lot coverage" shall include the footprint of the building plus cantilevers and decks higher than thirty (30) inches above grade.. Exceptions, not to be included when calculating lot coverage are: architectural projections, eaves, and open and unenclosed balconies that project from the face of the building, not exceeding a five-foot projection.

Sec. 601. Height.

No building shall exceed thirty-five (35) feet in height. Refer to Article 7.2 for additional height requirements for condominiums.

Sec. 606. Permissible lot coverage.

All buildings, including accessory buildings and structures, shall not cover more than sixty-five (65) percent of the area of the lot.

Sec. 607. Usable open space.

There shall be a minimum of two hundred (200) square feet of usable open space per dwelling unit.

(1) Fifty (50) percent of the required open space shall be directly accessible to each unit and solely for private enjoyment and use by a specified unit.

(2) Private and common open space may be covered up to fifty (50) percent, but shall not be enclosed on more than two (2) sides.

(3) The minimum dimension of open space areas shall be seven (7) feet.

(4) Common open space areas may include pools, spas, gardens, play equipment, courtyards (a minimum of twenty (20) feet wide), decks over non-living areas, and/or similar area, but shall not include driveways, turning areas; parking areas, and required front, rear, and side yard areas.

(5) Private open space areas may include patios, pools, spas, and garden areas; also balconies and decks over non-living areas or over living areas of the same dwelling unit when accessible through the interior of the dwelling unit and over only the dwelling unit for which there is interior access.

(6) Refer to Article 7.2 for additional requirements for condominiums.

(7) When computing open space in conjunction with yard areas, only an area which exceeds the minimum required yard area may be counted toward open space and only if the overall dimension of the required setback and the exceeding area together has a dimension of at least seven (7) feet in width and length.

(8) Circular, triangular, odd, and/or unusual shaped open space areas shall have a minimum of forty-nine (49) square feet in area as well as minimum seven-foot dimensions.

(9) Decks, balconies or similar areas which extend over more than one (1) dwelling unit shall have a minimum S.T.C. rating of 58.

CONDITIONAL USE PERMITS

Sec. 1404. Purpose.

The purpose of a conditional use permit shall be:

(1) To assure that the degree of compatibility shall be maintained with respect to the particular use on the particular site and in consideration of other existing and potential uses within the general area in which such use is proposed to be located; and

(2) To recognize and compensate for variations and degree of technological processes and equipment as related to the factors of noise, smoke, dust, fumes, vibration, odors and hazards.

PRECISE DEVELOPMENT PLANS

Sec. 1430. Purpose and intent.

The purpose and intent of requiring precise development plan review for development projects is to achieve a reasonable level of quality, compatibility, in harmony with the community's social, economic and environmental objectives, and to protect existing and potential developments, and uses on adjacent and surrounding property.

Sec. 1431. Projects requiring review.

In order to achieve the purpose of this section, it is considered necessary to require that the use of land, erection, construction or location of buildings or structures in any zone shall require submittal of plans for planning commission review, with the exception of the following:

(1) Single-family residences, including new construction, remodels, or additions thereto.

(2) Remodels or additions of less than one thousand five hundred (1,500) square feet in any zone.

Sec. 1432. Standards and review criteria.

(A) *Standards.* All development shall be in compliance with minimum standards of the zoning ordinance. On a case basis, the planning commission may impose standards above the minimums designated by the zoning ordinance to improve the quality of development and to mitigate any environmental impacts.

(B) *General criteria.* In considering the precise development plan for any development, the following

criteria for granting or conditionally granting said permit shall be considered:

(1) Distance from existing residential uses in relation to negative effects.

(2) The amount of existing or proposed off-street parking in relation to actual need.

(3) The combination of uses proposed, as they relate to compatibility.

(4) The relationship of the estimated generated traffic volume and the capacity and safety of streets serving the area.

(5) The proposed exterior signs and decor, and the compatibility thereof with existing establishments in the area.

(6) Building and driveway orientation in relation to sensitive uses, e.g., residences and schools.

(7) Noise, odor, dust and/or vibration that may be generated by the proposed use.

(8) Impact of the proposed use to the city's infrastructure, and/or services.

(9) Adequacy of mitigation measures to minimize environmental impacts in quantitative terms.

(10) Other considerations that, in the judgment of the planning commission, are necessary to assure compatibility with the surrounding uses, and the city as a whole.

(C) *Criteria for denial.*

(1) The proposed development would substantially depreciate property values in the vicinity or interfere with the use or enjoyment of property in such area, because of excessive dissimilarity or inappropriateness of design in relation to the surrounding vicinity, and there are no known conditions of approval which can be imposed that could resolve such problems.

(2) The proposed development would have significant environmental adverse impacts which are not mitigable, and where the finding of overriding considerations cannot be made.

Supreme Court, U.S.
FILED
MAR 12 1997
CLERK

No. 96-1278

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

DOUGLAS A. CLARK AND CHERYL CLARK
Petitioners,
v.
CITY OF HERMOSA BEACH and CITY COUNCIL OF THE CITY OF HERMOSA BEACH
Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of California Second Appellate District, Division One

BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AND THE BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1278

DOUGLAS A. CLARK AND CHERYL CLARK

Petitioners,

v.

CITY OF HERMOSA BEACH AND CITY COUNCIL OF THE CITY OF HERMOSA BEACH

Respondent,

BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AND THE BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

The National Association of Home Builders ("NAHB") and the Building Industry Legal Defense ("BILD") Foundation have received the parties' written consent to file this brief as amici curiae in support of the petitioner and have filed the letters of consent with the Clerk of the Court.

I. THE INTERESTS OF THE AMICI CURIAE ARISE FROM THEIR MEMBERS' CONCERNS AS TO THEIR ABILITY TO OBTAIN JUDICIAL REVIEW OF ACTIONS WHICH INVOLVE THE USE OF LAND

The NAHB represents over 190,000 builder and associate members throughout the United States. Its members include people and firms that construct and supply single family homes as well as apartment, condominium, commercial and industrial builders, land developers, and remodelers. It is the voice of the American shelter industry. It is, therefore, concerned with any judicial decision that calls into question the right of its members to use their land and, when their right to use land is unduly interfered with by local governmental actions, to seek judicial review of those actions.

The NAHB has been before the Court as an amicus curiae or as "of counsel" to the property owner in a number of cases involving the rights of landowners to use their property and the remedy to be applied when those rights are interfered with. These include *Agins v. City of Tiburon,* 447 U.S. 255 (1980), *San Diego Gas & Electric Co. v. City of San Diego,* 450 U.S. 621 (1981), *Williamson County Regional Planning Commission v. Hamilton Bank,* 473 U.S. 172 (1985), *MacDonald, Sommer & Frates v. Yolo County,* 477 U.S. 340 (1986), *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987)[1], and *Dolan v. City of Tigard,* 512 U.S. 374 (1994).

The BILD Foundation is a wholly owned subsidiary of the Building Industry Association of Southern California, a constituent part of the NAHB, whose 1,400 members include a significant number of residential developers and associate businesses that take part in building 70% of all new residential units annually in the Southern California region.

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[1] The Court's opinion cited the NAHB's brief. 483 U.S. at 840.

The amici curiae submit their amici curiae brief in support of the petitioners in the present case in order to assist the Court in determining whether to grant its writ of certiorari to determine if the property protected by the Fifth and Fourteenth Amendments to the Federal Constitution inheres in the ownership of land or if, as asserted by several of the federal circuits and the state courts which have begun to follow those circuits, the existence of a protected property right in the use of land exists only when government has no discretion with respect to that use.

II. SUMMARY OF THE ARGUMENT

The federal and state courts are in massive conflict as to whether an owner of land—real property—who seeks governmental approval for the use of that land has a property interest protected by the Due Process Clause of the Fourteenth Amendment as a result of that ownership or whether a protectable property interest arises only when the governmental agency involved has no discretion with respect to granting the approval sought. This is an important question because, if a landowner has no protected property interest, he or she has no constitutional right to notice or hearing, fair procedures, nor substantively reasonable decisions, i.e., decisions which are not arbitrary or capricious. Even where courts have found the existence of the requisite property interest, there is disagreement amongst federal and state courts as to what level of review—how arbitrary or capricious the governmental action can be—the landowner is entitled to.

This Court, and this Court alone, can answer the questions of federal law presented by the petitioners because the federal courts of one circuit are not bound to follow the decisions of those in another and state courts are not bound to follow those of any lower federal court. Thus, until this Court speaks, the result of any attempt by a landowner to seek relief for a claimed violation of the Due Process Clause will turn on the fortuity of

where the land is located and whether the landowner's lawyer files in state or federal court. This is no way to interpret a provision of the United States Constitution.

III. THERE ARE MASSIVE CONFLICTS BETWEEN FEDERAL AND STATE COURTS

Article I of the Fourteenth Amendment prohibits the States from depriving anyone of property without due process of law. This Court has held that the use of land is an aspect of property. *Henneford v. Silas Mason Co.,* 300 U.S. 577, 582 (1937). The ownership of land, a term synonymous with real property, *see,* the definition of real property given in Black's Law Dictionary, 1218 (6th ed. 1990), with its concomitant right of use, would appear to be precisely the type of property interest protected by the Fourteenth Amendment. This Court has said precisely that:

> "The right of the [landowner] to devote its land to any legitimate use is property within the protection of the Constitution." State of Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 121 (1928).

Nevertheless, many federal and state courts have adopted a rule of interpretation which holds that there is no property interest in the land use context protected by the Due Process Clause as long as the governmental agency responsible for granting a land use approval has any discretion in the granting or conditioning of that approval.

One of the primary purposes for which this Court uses its certiorari jurisdiction is to resolve conflicts amongst federal and state courts. *Braxton v. United States,* 500 U.S. 344, 347 (1991), and Rule 10 of the Rules of the Supreme Court of the United States. It is hard to conceive of a situation where the conflict amongst federal and state courts could be more widespread than that found in the land use context as presented by the current petition for certiorari.

A. There Are Conflicts Between Different Federal Circuits As To When A Protected Property Interest Exists In The Land Use Context.

A number of decisions from several circuits have held that the property interest protected by the Fourteenth Amendment inheres in the ownership of land and the right to its use subject, of course, to reasonable regulation. *Blanche Road Corp. v. Bensalem Township,* 57 F.3d 253, 268 n.15 (3d Cir.), cert. denied,—U.S.—, 116 S.Ct. 303 (1995); *DeBlasio v. Zoning Board of Adjustment,* 53 F.3d 592, 600-601 (3d Cir.), cert. denied,—U.S.—, 116 S.Ct. 352 (1995); *Riverpark, Inc. v. City of Highland Park,* 23 F.3d 164, 165-166 (7th Cir. 1994); *Polenz v. Parrott,* 883 F.2d 551, 556 (7th Cir. 1989); and *Harris v. County of Riverside,* 904 F.2d 497, 503 (9th Cir. 1990) (citing and quoting from *State of Washington ex rel Seattle Title Trust Co. v. Roberge,* 278 U.S. 116 (1928)).

On the other hand, there are a number of cases from a number of other circuits which have held that a property interest arises in the land use context only where the governmental body responsible for approving the desired land use has no discretion; that is, where the landowner has shown a "legitimate claim of entitlement" as opposed to a "mere expectancy." These cases stand for the proposition that the Due Process Clause does not apply in the land use context and that the landowner must look elsewhere—to state law—for protection against actions taken without notice or hearing, pursuant to unfair procedures, or, substantively, in an arbitrary and capricious manner. *Norton v. Village of Corrales,* 103 F.3d 928, 931-932 (10th Cir. 1996); *Crowley v. Courville,* 76 F.3d 47, 51-52 (2d Cir. 1996); *Villager Pond, Inc. v. Town of Darien,* 56 F.3d 375, 378-379 (2d Cir. 1995); *Triomphe Investors v. City of Northwood,* 49 F.3d 198, 201-203 (6th Cir.), cert. denied,—U.S.—, 116 S.Ct. 70 (1995); *Sylvia Development Corp. v. Calvert County,* 48 F.3d 810, 825-828 (4th Cir. 1995); *Zahra v. Town of Southold,* 48 F.3d 674, 679-682 (2d Cir. 1995); *Acierno v. Cloutier,* 40 F.3d 597, 616 (3d Cir. 1994); *Orange Lake Associates, Inc. v. Kirkpatrick,* 21

F.3d 1214, 1224-1225 (2d Cir. 1994); *Gagliardi v. Village of Pawling*, 18 F.3d 188, 191-193 (2d Cir. 1994); *L.M. Everhart Construction, Inc. v. Jefferson County Planning Commission*, 2 F.3d 48, 51-52 (4th Cir. 1993); *Biser v. Town of Bel Air*, 991 F.2d 100, 103-104 (4th Cir.), cert. denied, 510 U.S. 864 (1993); *Gardner v. City of Baltimore*, 969 F.2d 63, 68-69 (4th Cir. 1992); *Seguin v. City of Sterling Heights*, 968 F.2d 584, 590-592 (6th Cir. 1992); *Silver v. Franklin Township Board of Zoning Appeals*, 966 F.2d 1031, 1036 (6th Cir. 1992); *Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence*, 927 F.2d 1111, 1115-1118 (10th Cir. 1991); *Spence v. Zimmerman*, 873 F.2d 256, 258-259 (11th Cir. 1989); *RRI Realty Corp. v. Incorporated Village of Southampton*, 870 F.2d 911, 914-918 (2d Cir.), cert. denied, 493 U.S. 893 (1989)[2]; *Bateson v. Geisse*, 857 F.2d 1300, 1305 (9th Cir. 1988); *Dean Tarry Corp. v. Friedlander*, 826 F.2d 210, 212-213 (2d Cir. 1987); *Yale Auto Parts v. Johnson*, 758 F.2d 54, 57-60 (2d Cir. 1985); *Riverview Investments, Inc. v. Ottawa Community Improvement Corp.*, 769 F.2d 324, 327 (6th Cir. 1985); and *Parks v. Watson*, 716 F.2d 646, 655-657 (9th Cir. 1983).

It should also be noted that there are differences amongst the appellate panels in a single circuit and sometimes even in a single case. Thus, the Ninth Circuit has come down squarely on both sides of the question, holding that the property interest was in the ownership of land for the purposes of analyzing a procedural due process claim in *Harris v. County of Riverside, supra*, after looking at the existence of a "legitimate claim of entitlement" when analyzing a procedural due process claim in *Parks v. Watson, supra*. Further, in *Bateson v. Geisse, supra*, the Court of Appeals found a substantive due process violation without analyzing the property interest involved, 857 F.2d at 1303-1304, while finding no procedural due process violation

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[2] The majority opinion held bound by previous Second Circuit decisions to apply the "legitimate claim of entitlement test instead of simply recognizing the owner's indisputable property interest in the land he owns ..." 870 F.2d at 917-918.

because of the absence of a "legitimate claim of entitlement." 857 F.2d at 1305.

It is not clear whether the same problem has arisen in the Third Circuit. In *Acierno v. Cloutier, supra,* the Court of Appeals, sitting en banc, cited the Second Circuit test requiring the demonstration of a "legitimate claim of entitlement" in the context of deciding an immunity issue based on a substantive due process violation claim. 40 F.3d at 616. On the other hand, the Third Circuit has been extremely clear in holding that the ownership of the land is the protectable interest. *Blanche Road Corp. v. Bensalem Township, supra,* and *DeBlasio v. Zoning Board of Adjustment, supra.*

This kind of conflict—among circuits, between courts in the same circuit, and sometimes even in the same opinion—requires resolution by this Court.

B. A Number Of State Courts Are Now Applying The "Legitimate Claim Of Entitlement" Test.

A number of state courts have found violations of the Due Process Clause in the land use context. However, they have generally done this without analyzing the precise property interest involved. See, e.g., *Sundheim v. Board of County Commissioners,* 904 P.2d 1337, 1346 (Colo.App. 1995)(open question in Colorado as to what the protected property interest is), aff'd, 926 P.2d 545 (Colo. 1996); *Bakken v. City of Counsel Bluffs,* 470 N.W.2d 34, 38-39 (Iowa 1991); *Rivkin v. Dover Township Rent Leveling Board,* 143 N.J. 352, 363-380, 671 A.2d 567, 573-582, cert. denied,—U.S. —, 117 S.Ct. 275 (1996); *Moongate Water Co., Inc. v. State,* 120 N.M. 399, 404-405, 902 P.2d 554, 559-560 (1995); *Bartlett v. Cinemark U.S.A., Inc.,* 908 S.W.2d 229 (Tex.App. 1995); and *Lutheran Day Care v. Snohomish County,* 119 Wash.2d 91, 117, 117-125, 829 P.2d 746, 758-763 (1992).

Some state courts have discussed the two possibilities as to what constitutes a protectable property interest and have then come down on the side of the "legitimate claim of entitlement"

test. *Kelley Property Development, Inc. v. Town of Lebanon,* 226 Conn. 314, 320 n.11, 321-322, 627 A.2d 909, 913 n.11, 914 (1993); and *Electro-Tech, Inc. v. H.F. Campbell Co.,* 433 Mich. 57, 77 n.22, 114-118, 445 N.W.2d 61, 70 n.22, 87-89 (1989), cert. denied, 493 U.S. 1021 (1990).

Finally, a number of state courts have adopted the "legitimate claim of entitlement" test without even referring to the possibility that the protectable right might lie in the ownership of land. *City of Buford v. Ward,* 212 Ga.App. 752, 756, 443 S.E.2d 279, 283 (1994); *Security Management Corp. v. Baltimore County,* 104 Md. App. 234, 245-249, 655 A.2d 1326, 1331-1333, cert. denied,—U.S.—, 116 S.Ct. 917 (1995); *Rosenfeld v. Board of Health,* 27 Mass.App.Ct. 621, 627, 541 N.E.2d 375, 379 (1989); *Boulder City v. Cinnamon Hills Associates,* 110 Nev. 238, 246, 871 P.2d 830, 325-326 (1994); *Town of Orangetown v. Magee,* 88 N.Y.2d 41, 52, 665 N.E.2d 1061, 1068, 643 N.Y.S.2d 21, 28 (1996); and *Fairmont Township Board of Supervisors v. Beardmore,* 431 N.W.2d 292, 295 (N. Dak. 1988).

C. Federal And State Courts Are In Conflict As To What Constitutes The Proper Standard Of Review.

Even in those courts which recognize the possibility that actions taken by a governmental body in the land use context may violate the Due Process Clause, there is still substantial conflict as to what the proper standard of review is. As pointed out in the petition for certiorari at 23-24, it is bad enough that there are conflicts between circuits and amongst the states, but it is intolerable that the results may turn on which court—federal or state—a complaint is filed in. In California, as demonstrated by the case under consideration, a landowner who files a complaint in state court alleging a violation of the Due Process Clause will be forced to face the "legitimate claim of entitlement" test and then demonstrate that the action by the governmental body shocks the conscience. On the other hand, by filing in a district court in the Ninth Circuit, the ownership of land will be sufficient, *Harris v. County of Riverside, supra.*

In New Mexico, a landowner apparently has a property interest by virtue of ownership of land but can prevail only if he or she can convince the state court that the governmental action "shocks the conscience." *Moongate Water Co., supra,* 120 N.M. at 404, 902 P.2d at 559. On the other hand, the Tenth Circuit uses the "legitimate claim of entitlement" test but analyzes the validity of a claim that the Due Process Clause has been violated to determine whether the governmental action complained of was "arbitrary and capricious." *Jacobs, Visconsi & Jacobs, supra,* 927 F.2d at 1119.

Finally, for some unknown reason, state courts located in the Third Circuit are in disagreement with the Circuit Court of Appeals. In *Rivkin v. Dover Township Rent Leveling Board, supra,* the New Jersey Supreme Court adopted the "shocks the conscience" test and then stated:

> "We acknowledge that the standard that we adopt today may be contrary to the more expansive interpretation given the Due Process Clause by many circuit courts, which have found that 'arbitrary or irrational' government actions deny substantive due process rights. See, e.g., *De Blasio v. Zoning Bd. of Adjustment,* 53 F.2d 592, 593 (3d Cir.) . . ." 143 N.J. at 368, 671 A.2d at 576.

The concurring opinion in *Anselma Station, Ltd. v. Penoni Associates, Inc.,* 654 A.2d 608 (Pa.Cmwlth 1995), is similar:

> "The Third Circuit may want district courts to sit often as super zoning hearing boards by hearing Section 1983 actions with jury trials in some cases, but I don't believe this court or the common pleas courts want to assume that role." 654 A.2d at 620.

IV. ONLY THIS COURT CAN RESOLVE THE CONFLICTS AMONGST FEDERAL CIRCUITS AND STATE COURTS

Decisions by a court of appeals in one federal circuit are not binding upon the courts in another circuit. *Generali v.*

D'Amico, 766 F.2d 485, 489 (11th Cir. 1985). California follows the general rule that state courts are not bound by the interpretations of federal statutes by the lower federal courts. *Rohr Aircraft Corp. v. County of San Diego,* 51 Cal.2d 759, 764, 336 P.2d 521, 524 (1959), and 21 CJS, Courts, § 158, Decisions of United States Courts as Precedents in State Court. On the other hand, when this Court speaks, all lower courts, federal and state, must listen.

> "The determination by this court of [a federal] question is binding upon the state courts, and must be followed, any state law, decision, or rule to the contrary notwithstanding." *Chesapeake & O.R.R. v. Martin,* 283 U.S. 209, 221 (1931).

Until this Court speaks, the conflicts will continue and the uncertainty will remain.

V. CONCLUSION

The lower courts—federal and state—are crying out for a definitive statement as to the application of the Due Process Clause in the land use context.

> "'The lower courts' differing approaches to the treatment of substantive due process in these areas [land use] suggests the obvious need for Supreme Court clarification.' *Levinson, supra,* 16 U. Dayton L. Rev. at 18." *Rivkin, supra,* 134 N.J. at 371, 671 A.2d at 577.

See also *Anselma Station, supra,* 654 A.2d at 613:

> "The Supreme Court has not seen fit to visit the issue of what is required to properly allege a Section 1983 violation for deprivation of substantive due process."

Finally, in what can only be described as a masterful understatement, the Tenth Circuit stated:

> "There is some confusion in the law as to when a person has a property right in a [land use] context like that before us." *Norton v. Village of Corrales, supra,* 103 at 931.

This Court has to clear up that confusion and the petition now before the Court provides the perfect vehicle to do so. As it stands today, there are a number of courts which hold that the Due Process Clause does not provide protection in the land use context. This should not be the law but, if it is to be the law, then it should be stated by this Court.

Accordingly, the NAHB and the BILD Foundation ask that this Court grant Mr. and Mrs. Clark's petition for certiorari and remove the conflict, confusion, and uncertainty which currently exists.

DATED: March 12, 1997

Respectfully submitted,

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No. 96-1278

In the

Supreme Court of the United States

October Term, 1996

DOUGLAS A. CLARK and CHERYL CLARK,
Petitioners,

v.

CITY OF HERMOSA BEACH and CITY COUNSEL OF THE CITY OF HERMOSA BEACH,
Respondents.

Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I

INTRODUCTION

The City misunderstands the basic nature of the Clarks' argument. The Clarks are not complaining about a "deprivation of the right to reasonable use of the land," Opposition at 1, but are arguing that because there has been a deprivation of a right to a fair hearing, they deserve a meaningful remedy for *that* deprivation. In short, the Clarks are not claiming any "entitlement" to any particular permit, building height, or building configuration. They are asking that the hearing procedures used to fix restrictions on the use of their property be fair and, if they are not fair, that there be access to an adequate remedy as provided by 42 U.S.C. § 1983.

A. There Is a Final Judgment in This Case

The court below finally disposed of the Clarks' claim for damages and attorneys' fees under the Due Process Clause. The decision is quite clear. Under the interpretation of the court below, the Clarks have no right to procedural due process in government hearings on the permitted uses of their property. No rehearing on their permit will change this result. Nor will it alter the measure of damages. The Clarks allege that if they had been given a fair hearing on their permit application they would not have suffered higher construction costs, lower property values, and emotional distress. *See* Petitioners' App. A-15. That the permit could theoretically be denied at a subsequent hearing does not render the trial court any less capable of determining the damages caused by the unfair procedures.

In *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469 (1975), this Court explained that the finality doctrine could not be applied in a "mechanical fashion," 420 U.S. at 477, instead, the Court preferred "'a more liberal, and, as we think, a more reasonable construction.'" *Id.* at 480 (citing *Forgay v. Conrad*, 47 U.S. (6 How.) 201, 203 (1848)).

The present case easily falls within the ambit of *Cox Broadcasting*. "In the first category are those cases in which there are further proceedings--even entire trials--yet to occur in the state courts but where for one reason or another the federal issue is conclusive." *Id.* at 479. It is irrelevant that there will be a new

hearing on the Clarks' application, the federal issue of whether the constitution requires a fair hearing has been conclusively decided.

Cox Broadcasting also supports review in cases where the refusal of immediate review "might seriously erode federal policy." 420 U.S. at 482. The federal policy of protecting civil rights under Section 1983 is now inapplicable in California to individuals seeking to protect their right to a fair hearing when government restricts their ability to make use of their land.

Immediate review by this Court is necessary to restore the right of fair hearings.

The decision on the Clarks' due process-based claims is final.

B. All Relevant Claims Were Raised Below

The Clarks properly raised below all the claims and issues that are in their petition. The claims brought by the Clarks included a claim that they had been denied a fair hearing, that this denial deprived them of due process, and that this deprivation was a violation of 42 U.S.C. § 1983. App. A-12, C-9-15. Respondents suggest that because the Clarks focused more on their rights to the subject permit than on their underlying right to use their property, they never properly raised the claim below. That, of course, is untrue. The underlying claim is that there was a denial of the Clarks' right to due process in violation of Section 1983. That has not changed.

Pointing out that there is a property interest in the ownership of land and that due process must attach when restrictions are imposed on the use of land is *not* a different claim from that made below. Even if their *argument* is viewed as having been revised, it is not conceivably a new *claim*. Their claim is that there is a due process violation of their rights under Section 1983 because they were denied their due process rights to a fair hearing. Part of their argument in support of their claim is that they are entitled to the protections of the Due Process Clause since the hearing at issue implicated protected property interests. Merely placing greater emphasis on the underlying nature of their property right has nothing to do with raising a new claim.

Even if this were a brand new argument, which it is not, this Court has held that it is acceptable to raise in a petition for certiorari a new argument in support of an existing claim. *See, e.g., Lebron v. National Passenger Railroad Corp.*, ___ U.S. ___, 115 S. Ct. 961,

965 (1995). In *Yee v. City of Escondido*, 503 U.S. 519 (1992), this Court recognized, in the context of a takings claim, that it is proper to raise a new theory or argument in a petition for certiorari if that theory is in support of the same claim:

> Petitioners' arguments that the ordinance constitutes a taking in two different ways, by physical occupation and by regulation, are not separate claims. They are rather separate arguments in support of a single claim--that the ordinance effects an unconstitutional taking. Having raised a taking claim in the state courts, therefore, petitioners could have formulated any argument they liked in support of that claim here .... A litigant seeking review in this Court of a claim properly raised in the lower courts thus generally possesses the ability to frame the question to be decided in any way he chooses, without being limited to the manner in which the question was framed below.

Id. at 534-35.[1]

Most telling of all is the fact that the decision below categorically stated that "there is no federally protected property interest on which to base a procedural due process claim." App. A-39. Thus, whether or not the Clarks used the same language to explain their theory that the ownership of property gives rise to an entitlement of due process, the court below issued a ruling that forecloses any permutation of that argument. "Our practice 'permit[s] review of an issue not pressed so long as it has been passed upon.'" *Lebron*, 115 S. Ct. at 965. The court below said that there is "no" protected property interest here. The Clarks must be given an opportunity to demonstrate that they *do* have a protected property interest and should not be restricted to describing that interest using only the exact same word choices used before the lower courts. As explained in the petition and *infra*, other circuits have found that land

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[1] In *Yee*, of course, this Court did not address the new theory because it had not been raised in the petition for certiorari. *Id.* at 538. But this Court made it plain that if *Yee* had raised the argument in the petition stage, then this Court *could* have granted certiorari and heard argument on the regulatory taking claim. *Id.* at 535.

ownership in and of itself is a protected property interest. This issue is properly before this Court and in need of review.

C. There Is a Substantial Conflict Among the Circuits and the California Court

The City of Hermosa Beach's (City) argument that there is no conflict with the Seventh Circuit opinion in *River Park, Inc. v. City of Highland Park*, 23 F.3d 164 (7th Cir. 1994), relies entirely on a mischaracterization of that decision. The District Court had denied River Park's claim based on the denial of its rezoning request, holding that River Park had no "legitimate claim of entitlement" in the rezoning it sought. *Id.* at 165.

On review, the Seventh Circuit acknowledged that "[f]or reasons the district court gave, River Park may well have lacked a property interest in one classification rather than another." *Id.* at 165-66. Nevertheless, in stark contrast to the many circuits, and the California court in this case, the Seventh Circuit held:

> But it [River Park] surely had a property interest in the land, which it owned in fee simple, and it is therefore entitled to contend that the City's regulation of that land deprived it of property without due process.

Id. at 166.

It stretches credulity to suggest that the Seventh Circuit is in accord with the other circuits or that *River Park* does not count. The Seventh Circuit was clear in stating the property interest protected by procedural due process derives from land ownership, it does not derive from a perceived entitlement that the state may alter at will.

The conflict raised by the Third Circuit in *DeBlasio v. Zoning Board of Adjustment for the Township of West Amwell*, 53 F.3d 592 (3d Cir. 1995), is equally apparent. As in *River Park*, the court noted that the zoning board had discretion to grant or deny the requested zoning variance. *Id.* at 597. Nonetheless, the court assumed DeBlasio had a protected property interest in his land and rejected his procedural due process claim on other grounds. *Id.* at 596-98. When the Third Circuit examined DeBlasio's substantive due process claim, the court held:

> We think it consistent with *Bello* to conclude that ownership is a property interest worthy of substantive due process protection .... Indeed, one would be hard-

> pressed to find a property interest more worthy of substantive due process protection than ownership.

Id. at 600-01.

That this standard applied equally to procedural due process in the Third Circuit is evident from that court's statement implying protected property interests under substantive due process are more limited than under procedural due process. "[I]t is apparent ... that, in this circuit at least, not all property interests worthy of procedural due process protection are protected by the concept of substantive due process." *Id.* at 598.

Thus, in the Seventh and Third Circuits, land ownership is a protected property interest under both procedural and substantive due process. California property owners, however, do not enjoy such constitutional protection.

D. The Court Below Misapplied *Roth*

Board of Regents v. Roth, 408 U.S. 564 (1972), was not a land use case. The significance of *Roth* is that for the first time this Court held procedural due process should attach *not only* to restrictions imposed on the holders of traditional property interests such as land ownership, *but also* to the denial of government benefits to persons with certain entitlements, such as continued employment. This Court stated: "The Court has also made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money." *Id.* at 571-72.

The reason why the Clarks' desire to replace their duplex with condominiums should be treated differently than the professor's desire for continued employment is that the Clarks were exercising their inherent right to use their land, whereas the professor sought only to enforce a perceived benefit conferred by the government. In a land use case, a permit is a restriction on an already protected entitlement to use land.[2] In a government benefits case, there is no entitlement except what the government confers.

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[2] As this Court has stated elsewhere: "But the right to build on one's own property--even though its exercise can be subjected to legitimate permitting requirements--cannot remotely be described as a 'government benefit.'" *Nollan v. California Coastal Commission*, 483 U.S. 825, 833 n.2 (1987).

This Court has always operated on the assumption that land ownership is a protected property interest for due process purposes. *See* Petition at 15. Respondents cite no cases from this Court that support their contention that (1) *Roth* applies to land ownership or (2) land ownership is not a property interest protected by the Due Process Clause. In a telling statement about the effect of this Court's decision in *Roth*, the Second Circuit opined:

> It is not readily apparent why land regulation cases that involve applications to local regulators have applied the *Roth* entitlement test to inquire whether an entitlement exists in what has been applied for--whether a zoning variance, a business license, or a building permit--instead of simply recognizing the owner's indisputable property interest in the land he owns.

RRI Realty Corp. v. The Incorporated Village of Southampton, 870 F.2d 911, 917 (2d Cir. 1989).

E. No Authority Holds That a Section 1983 Action for a Violation of Federal Constitutional Rights Will Not Lie When a State Writ of Mandamus Is Available

The City cites *DeBlasio v. Zoning Board of Adjustment*, 53 F.3d at 592, for the proposition that "the remedy for ... denial of a fair hearing [] generally lies in state court." Opposition at 18. The significance of this proposition is obscure, given that the Clarks *did* in fact file this action in California Superior Court. Claims brought under 42 U.S.C. § 1983 can be, and routinely are, brought in state court. Nothing in *DeBlasio* supports the City's claim that the Clarks are limited to a mandamus remedy.

The same difficulty confronts the City's citation to *River Park, Inc.* Even if it is true that the remedy for a "failure to implement state law" lies "in state court," that is exactly where this action was filed! Nothing in the cited language from *River Park* suggests that damages for violation of the federal constitutional right to a fair hearing are barred merely because there exists a state procedure to win a new hearing. Neither this Court, nor any court cited by the City, has held the only remedy available for violation of the constitutional right of due process is a new hearing. Citizens who incur financial injury by reason of the City's violation of their constitutional rights have a right under 28 U.S.C. § 1983 to recoup those damages.

The utter absence of any authority supporting the City's position is consistent with the fact that administrative mandamus is ***not*** "clearly an adequate remedy" for the deprivation of federal constitutional rights. Opposition at 20. In fact, this Court has already considered this issue and rejected the City's argument in the analogous context of regulatory takings.

In *Agins v. City of Tiburon*, 24 Cal. 3d 266, 598 P.2d 25 (1979), the California Supreme Court held that California cities could not be sued for damages for violating the Fifth Amendment so long as aggrieved citizens had access to the alternative remedies of declaratory relief or mandamus. 24 Cal. 3d at 269-70, 598 P.2d at 26. This doctrine was rejected in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), where this Court held that invalidation was ***not*** a sufficient remedy for the violation of federal constitutional rights under the Takings Clause. 482 U.S. at 318-19. The same reasoning should apply in rejecting the City's attempted resurrection of *Agins* in a due process context.

The court below found that the City willfully (after consulting counsel) engaged in conflicts of interest (App. A-8, A-22), deprived the Clarks of their right to a fair hearing (App. A-22-24), and exhibited bias and partiality against the Clarks in its official actions (App. A-23, A-24). Yet the only relief granted by the California court was to issue a writ of mandate requiring the City to repeat the process by conducting a new hearing! App. A-24-25.

F. The Court Below Wrongly *Identified* the "Arbitrary or Irrational Conduct" Standard with the "Shocks the Conscience" Standard

The City plays semantic games by asserting that the court below "found" the City's actions were not "arbitrary or irrational." Opposition at 23. It is true that the decision of the Court of Appeal includes the statement. Yet, in arriving at its conclusion that the City's conduct did not violate the Due Process Clause, the court consistently applied the "shocks the conscience" standard *as its due process test*: (1) "[T]he Due Process Clause ... prevents the government from engaging in conduct that 'shocks the conscience.'" App. A-31 n.28 (citations deleted); (2) "[D]ue process prevents ... 'abuse of government power that shocks the conscience.'" *Id.* at A-41 (citations deleted); (3) The standard for judging a due process claim

"is whether the challenged government action would 'shock the conscience' of ... judges." *Id.* at A-42 (citations deleted); (4) "[P]laintiff must ... demonstrate a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking." *Id.* (citations deleted); (5) "[T]he 'shock the conscience' standard requires a high level of outrageousness." *Id.* (citations deleted); and (6) "[W]e cannot say that its conduct, for due process purposes, was arbitrary or oppressive or that it "'shocks the conscience.'" *Id.* at A-43 (citations deleted).

As these passages illustrate, the Court of Appeal was explicit in applying the "shocks the conscience" test *as a proxy* for the "arbitrary and irrational" inquiry. In effect the court below conflated the two tests into one, finding that *because* the City's conduct did not shock the conscience of the court, the conduct *therefore* was not arbitrary or irrational. The City's claim that the Court of Appeal actually applied the "arbitrary and irrational" standard to the facts of this case--independently of the "shocks the conscience" inquiry--and found that the City's conduct did not violate this standard, is belied by a fair reading of the opinion.

G. The Court Below Inexplicably Applied the "Shocks the Conscience" Standard to Complaints About Procedural Violations

Not only did the court below conflate the "shocks the conscience" and the "arbitrary and irrational" standards, but it applied these standards to what are essentially complaints about *procedure*. Although the decision below spent much time reviewing the nature of substantive due process, *id.* at A-39-44, when it actually came to apply these tests, it applied them to *procedural* violations:

> [W]e cannot say that its [the city council's] conduct for due process purposes, was arbitrary or oppressive or that it "shocks the conscience." Although we have concluded that Councilmember Benz had a conflict of interest ... the Council did not act irrationally by allowing Benz to participate in the proceedings.

Id. at A-43. It is to this odd application of conflated substantive due process standards to a procedural complaint that the Clarks object and for which there is a genuine conflict in the lower courts. Petition at 21-22. The lower courts must understand that when the right to use property is subject to a permitting process, that process should

meet the standards of *Matthews v. Eldridge*, 424 U.S. 319 (1976), and its progeny rather than the wholly inappropriate standards of substantive due process formulated in the context of law enforcement-related violations of liberty interests. *See* Petition at 20 n.7 and 21.

CONCLUSION

The ability to make use of property is a right protected by the Constitution. Restrictions imposed upon the exercise of that right must be fair and subject to examination under meaningful standards of due process--*whether or not the landowner has a vested right to a particular permit*. In this case, it is beyond dispute that the procedures employed by the City were unfair and a violation of California law. Yet the Court found that there had been no due process violation because the landowner lacked a nondiscretionary right to a particular permit. Two federal circuits have plainly held that due process attaches in the land use context because the right being affected is the right to own and make use of property. Other circuits and the court below disagree. This Court should grant certiorari to resolve this conflict.

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Respectfully submitted,

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